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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Secretary of Commerce, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on February 16, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 26–40) is not yet reported. The decision of the Tax Court (R. 278–302) [1] is reported at 17 T. C. 1325.

[1] The record is the same as that before this Court in *United States* v. *California Eastern Line, Inc.*, No. 263, October Term, 1954.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1956. (App. A, *infra*, pp. 40–41.) By order of the Chief Justice dated May 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including May 23, 1956 (App. A, *infra*, p. 41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

By direction of the President, the United States Maritime Commission in the spring of 1941 conducted negotiations with many steamship lines, including respondent, to charter two million tons of shipping necessary to provide the Allies with supplies and equipment in aid of the war in North Africa against the Axis powers—the so-called "Red Sea operation". Detailed terms of a charter and agreement were negotiated and agreed upon between respondent and the Maritime Commission, without participation by any other government. After respondent's ship had sailed, the formal written charter was for technical reasons signed by a representative of the British Ministry of War Transport as the "charterer." All payments under the charter were made by the Maritime Commission from funds appropriated by Congress, and the administration of the charter was carried on solely by the Commission. The respondent was found by

the Commission to have made excessive profits on its venture.

The question presented is whether respondent had a contract with the Maritime Commission, a "Department" under Section 403 (a) of the Renegotiation Act of 1942 (as amended), which was renegotiable under that Act to eliminate excessive profits.

STATUTE INVOLVED

The pertinent provisions of the Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191 *et seq.*), are set forth in Appendix B, *infra*, pp. 42–44.

STATEMENT

The pertinent facts may be summarized as follows:

During April and May 1941, the Maritime Commission, at the request of the President and in an effort to coordinate shipping in furtherance of the national defense effort, assembled 2,000,000 tons of merchant shipping (R. 234, 279). Because of the shortage of available ships, the Commission, in order to accomplish this task, assembled the required tonnage from intercoastal vessels (R. 44). Included among the intercoastal vessels so assembled was respondent's ship, the *Vermont* (R. 44, 280).

At that time, the British Government requested from the United States, under the Lend-Lease

program, shipping facilities which it needed to transport war equipment and supplies for its North African compaign, then going badly against the Allies (R. 279–280). Pursuant to this request, the President directed the Maritime Commission to negotiate with various shipowners, including representatives of respondent, to secure the necessary tonnage for this operation (R. 291).[2] To clear the way for using American ships and American crews, the President also issued a proclamation on April 10, 1941, exempting the Red Sea area from the embargo imposed by the Neutrality Act of 1939 and his earlier proclamation of June 11, 1940 (R. 56). After much correspondence and numerous conferences during April and May 1941, Commission officials and the shipowners worked out the terms under which the *Vermont* and other vessels were to be chartered for the "Red Sea operation," including the charter rates which the owners were to be paid (R. 280).

These negotiations were had solely between respondent's representatives and representatives of the Maritime Commission, and the final terms of the charter were approved by the Commission (R. 280–284). Neither the British Government nor any of its agencies or representatives took part in the negotiations on the terms of the charter

[2] This operation became known as the "Red Sea operation" because of the ultimate destination of the vessels. Cf. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 542.

for the *Vermont* or for any of the other ships in the "Red Sea operation" (R. 284). During the course of the negotiations, it was explicitly recognized by the shipowners, including respondent, that the "Maritime Commission will be a party directly or indirectly to the transaction" (R. 72).[3] It was also understood that the British Government might be the formally named charterer under these Red Sea charters (R. 74, 84, 284). However, only after the *Vermont* sailed on May 29, 1941 for Port Sudan and the British Government received assurances on June 9, 1941, that the Maritime Commission would make all payments due under the charter without reimbursement from the British did the British Government finally decide to execute the contract as charterer; a representative of the British Ministry of War Transport actually signed the charter on June 10, 1941 (R. 24, 284–285). Thereafter, deviations from the terms of the charter as written were discussed with and authorized by the Maritime Commission, not the British Ministry (R. 115, 267–8).

As understood from the outset by shipowners (R. 72, 74–75, 99), the Commission paid all the bills and other obligations under this charter directly to the shipowners from funds appropri-

[3] This understanding, expressed in a teletype sent on May 13, 1941, by John E. Cushing, representing all of the shipowners, to an official of the Commission, was conveyed to the other shipowners including respondent (R. 46).

ated by the Congress of the United States (R. 105, 135, 143, 151); at no time did the British Government do any more than certify to the Commission that the charter services had been performed (R. 134, 142, 150).

In the Government's view, full performance under respondent's charter was not completed until after April 28, 1942, the date on which Congress enacted the Renegotiation Act, 56 Stat. 245, 50 U. S. C. App. 1191, since final payment was not made until after that time. In accordance with the terms of that Act (as amended), the Chairman of the United States Maritime Commission, on November 27, 1943, commenced renegotiation proceedings with respondent in an effort to eliminate the excessive profits which respondent had realized from its Red Sea venture (R. 51–53). On March 31, 1949, a unilateral renegotiation order was issued determining that, of the $351,000 respondent had received under the charter, $164,000 represented excessive profits (R. 15–16).[4]

[4] The delay in issuing this order was attributable, in some measure, to the institution of judicial proceedings by respondent and others of the shipowners (R. 27), who sought to enjoin the administrative proceedings on the ground that the charters were not subject to renegotiation. This effort came to nought when this Court held that the Tax Court had exclusive primary jurisdiction of the issues attempted to be raised. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. It should be noted that the unilateral order refers to the contract "entered into on or about May 29, 1941," the date the Vermont sailed, not the date the formal charter was signed.

Respondent petitioned the Tax Court for redetermination of its excessive profits under Section 403 (e) (2) of the Renegotiation Act, as amended, *infra*, pp. 43–44 (R. 4–14). Thereafter, it moved the Tax Court to consider first, from among the various issues raised by its petition, its claim that its Red Sea charter was not subject to renegotiation (R. 25–31). The Tax Court granted this motion (R. 38),[5] and after a hearing, the court concluded, one judge dissenting, that the charter was "with" the British Ministry of War Transport and not "with" the Commission, and therefore was not renegotiable under the Act (R. 278–302). In so ruling, the Tax Court refused to admit in evidence an official statement of the British Government received through official diplomatic channels and certified by His Majesty's Ambassador to the United States (R. 297). This statement declared that, when its representative executed respondent's charter, it was understood that His Majesty's Government was acting only as an agent for the Maritime Commission and that the real party in interest was the United States (R. 272).

The United States petitioned the Court of Appeals for the District of Columbia Circuit to

[5] As a result of this severance, no issue as to the amount of excessive profits was presented to the Tax Court; the questions presented were restricted to a consideration of the jurisdiction of the Maritime Commission and the Tax Court to subject respondent's Red Sea charter to renegotiation.

review the Tax Court's decision. After ruling against the Government's contention that the Tax Court's determination must be vacated because of respondent's failure to substitute parties (204 F. 2d 398), the Court of Appeals dismissed the Government's appeal on the ground that the Tax Court's decision concerned an issue of "coverage," not of "jurisdiction," and was therefore not reviewable. 211 F. 2d 635. This Court, however, reversed, holding that the Tax Court's decision was reviewable under 26 U. S. C. 1141 (1939 I. R. C.). 348 U. S. 351.

On remand, the Court of Appeals once again ruled against the Government. The court affirmed the decision of the Tax Court that respondent's charter was not made "with" the Maritime Commission but "with" the British Ministry of War Transport.

REASONS FOR GRANTING THE WRIT

1. This case involves the renegotiability of the well-known "Red Sea charters", an issue which has been in litigation for over a decade but which has not yet, in our view, been properly resolved on a consideration of all the relevant factors. The controversy has already been twice before this Court on subsidiary questions, and on each occasion the Court has reversed a ruling of the court below which, if it had been allowed to stand, would have had the effect of permitting the shipowners to retain their exorbitant profits.

Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540; *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351.[6] Having finally reached the merits, the Court of Appeals has again, as we believe, erroneously ruled against the Government in an opinion which is plainly wrong.

The problem, it is true, harks back to World War II and concerns an era and a transaction which have passed into history. But the case involves the "recurrent evil" of "war profits" which "may justly arouse indignation", and it deals directly with the most significant effort of Congress to cope with such war-induced gains—the Renegotiation Act.[7] The decision below has frustrated, in an important area, the operation of this statutory device for eliminating war profits, and has permitted the "Red Sea charter" ship companies to retain excessive and unconscionable profits of a level which other war contractors of the 1941–1945 period have had to forego—profits of a type which should clearly

[6] In the *Waterman* case, the court below sanctioned a suit to enjoin the Maritime Commission from proceeding in these cases, despite the rule against maintenance of such an action prior to exhaustion of administrative remedies. 151 F. 2d 292. In the first *California Eastern* case, the court below denied jurisdiction to review the issue of contract renegotiability, despite its contrary consistent practice in cases brought by contractors. 211 F. 2d 635.

[7] Cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 308–9; *Lichter* v. *United States*, 334 U. S. 742; *United States* v. *Cors*, 337 U. S. 325, 333; *United States* v. *Commodities Corp.*, 339 U. S. 121.

be recaptured under the Renegotiation Act. For these reasons, together with the substantial sum which is at stake,[5] we believe that the case merits review by this Court in order to assure that this important litigation not be improperly terminated.

2. The decision below that respondent had no contract with the Maritime Commission seems to us to be clearly erroneous, and at war with the history of the transaction, the contemporaneous understanding of the various interests, the purposes of the Renegotiation Act, and the applicable rules of law.

(a). While purporting to base its determination on the entire record (App. A, *infra*, pp. 30, 39), the Court of Appeals—like the Tax Court (see R. 291–292)—actually accorded overriding weight to the stark fact that the charter was executed by the British Ministry of War Transport, rather than the Maritime Commission. But though the parties to an agreement are normally ascertained from the four corners of the formal document, it has long been settled that the real party in interest may be revealed by evidence over and beyond the written papers, particularly

[5] In all, there were 93 Red Sea voyages by 22 shipowners. Twelve additional Red Sea charter cases, involving more than $7,000,000 in excessive profits, are pending in the Tax Court. Seven of the remaining shipowners voluntarily repaid excessive profits of more than $3,000,000. As to the remaining two shipowners, it was administratively determined that their profits had not been excessive.

when the signatory is shown to be an agent and not the principal. See, *e. g., Jones* v. *Guaranty & Indemnity Co.,* 101 U. S. 622; *Lincoln National Life Ins. Co.* v. *Horwich,* 115 F. 2d 892, 895 (C. A. 7).

When the extrinsic facts, which are largely undisputed (see Statement, *supra,* pp. 3–6),[9] are taken into account, it is clear, on the one hand, that all parties regarded the joinder of the British Ministry on the charter as a mere technical formality and, on the other, that the Maritime Commission was the real party in interest, the true

[9] In 1955, this Court summarized the facts as follows (*United States* v. *California Eastern Line,* 348 U. S. 351, 352):

"In 1941 the Maritime Commission, defined as a 'Department' in the Act, was charged with responsibility for aiding the British Government in the transport of war equipment and supplies for use in World War II. Respondent, California Eastern Line, Inc., among others, was asked by the Commission to carry supplies to the Red Sea area for the African campaign. After extensive negotiations respondent agreed with the Commission on detailed contractual terms for the carriage. And it was agreed that respondent would be paid by the Commission out of funds appropriated by Congress under the so-called Lend-Lease Act. It was also understood that a written contract embodying only the terms previously agreed on would be executed between the respondent and the British Ministry of Transport. The charter was executed after respondent's boat had already sailed with its war cargo. In accordance with its agreement, the Commission paid the respondent about $351,000 of the carriage. Later the Commission chairman, after conforming with required procedure, determined that respondent should repay $164,000 as 'excessive profits.'"

principal. As the Tax Court expressly recognized (R. 298), "the Commission negotiated the terms and form of the charter, exercised supervision over performance under the charter, and, in behalf of the United States Government, furnished the funds and controlled payment under the charter." The entire procedure, including the form of charter, was officially approved by the Commission in a manner consistent with its being a contracting party (R. 86–88), and Commission officials carried out their dealings with the shipowners, before and after the formal signing of the charter, as if the Commission were the chief party in interest (see, *e. g.*, R. 90, 98–99, 102–3).[10]

In contrast, the participation of the British Ministry was strictly limited (1) to having its representative formally execute the written charter which had been negotiated solely by the Commission, and (2) to certifying to the Commission the invoices for payment. Indeed, the British representative did not execute the charter until June 10, 1941, only *after* the Ministry had been assured against liability thereunder at any time (R. 106; *supra*, p. 5). Meanwhile, on May 29, 1941, respondent, having an informal agreement with the Maritime Commission, had per-

[10] The court below rests its otherwise unsupported conclusion that the Commission's *own understanding* was that it was *not* the contractor (App. A. *infra*, pp. 32–34) on implications from some 1943 statements of the Commission's Chairman which show, at the most, that in his opinion the renegotiability of the contracts was "doubtful" because the Commission was not a formal signatory to the charter.

mitted the *Vermont* to sail for Port Sudan without knowing definitely who the formal charterer would be (*supra*, p. 5, see also R. 283–284). But the shipowners understood, all along, that the Commission would be a party to the transaction "directly or indirectly" (*supra*, p. 5). These undisputed facts demonstrate that, although the British Ministry was a formal signatory, respondent, like the shipowner in the *Waterman* case, "had contracted directly with a government agency, the Maritime Commission." *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 766.

(b) The British understanding of the transaction is conclusively shown by Exhibit G, which states in pertinent part (R. 271–272):[11]

> 3. His Majesty's Government took no part in the negotiations with the shipowners leading up to the execution of said charters.
>
> 4. At the request of the United States Government, the British Ministry of War Transport, a representative of his Majesty's Government, signed the charters as negotiated and drafted by the United States Maritime Commission and the shipowners. The signature by the representative of His Majesty's Government was requested by the United States Government on the ground that it was necessary to meet *formal* requirements. No charters were in fact executed by the representative of His

[11] The full text of Exhibit G is given in the opinion below (App. A, *infra*, pp. 35–36, fn. 6).

> Majesty's Government until after the receipt of a letter dated June 9, 1941, from the Office for Emergency Management to the effect that the obligations of the charters would be met by the United States Maritime Commission on behalf of the United States Government.
>
> 5. When the representative of His Majesty's Government signed the abovementioned charters, it was understood that His Majesty's Government in signing said charters were agents only and that the principal and real party in interest was the United States Government as represented by the United States Martime Commission.
>
> 6. The bills submitted by the shipowners under said charters to His Majesty's Government were forwarded to the United States Maritime Commission for payment. In forwarding such bills, the representatives of His Majesty's Government certified merely that the services specified had been performed.

This official *"Statement by his Majesty's Government"*, had it been admitted in evidence and accorded proper recognition, would have dissipated any doubt as to the relationship of the Maritime Commission and the British Ministry *vis a vis* the charter. But neither the Tax Court nor the Court of Appeals gave due weight to this significant document (R. 297–298; App. A, *infra*, pp. 34–40), and the erroneous grounds on which they rejected it emphasize the stellar role it should

properly have played. The Tax Court predicated its exclusion of the Statement on two bases, *i. e.*, that (1) "[n]owhere in the certificate of the Assistant Secretary of the Ministry of Transport is there any representation that the attached document represents the official views of the British Government" (R. 298), and (2) "[t]he statement itself does not appear to be an official record, nor is it an official statement of the views of the British Government. It merely incorporates information said to be collected by some unidentified person, and said to have been 'extracted' from some unidentified and undescribed documents" (R. 298). However, the British Government was officially requested through diplomatic channels for an "official statement" (R. 274–275), and the British Ambassador, in forwarding the statement as the "Statement of His Majesty's Government", advised that it was the statement requested, prepared by an Assistant Secretary of the Ministry of Transport "in performance of his official duties", and that there was attached thereto "a certificate authenticating it under the official seal of His Majesty's Ministry of Transport" (R. 276). In these circumstances, the statement plainly was what it purported on its face to be, *i. e.*, an official statement of the British Government.

Moreover, the fact that the persons who participated in drawing up the Statement are not given by name does not detract from its official

status; governments are not accustomed, in dealing with other governments, to specify the personnel who do the work resulting in a note or declaration or statement, and it is a mark of official status, rather than the opposite, that the declaration is simply the "Statement by His Majesty's Government" and not that of specified persons. Similarly, the omission of an indentification and description of the British documents on which the Statement is based tends rather to underscore its official nature than to remove it from that class, as the Tax Court thought. Nor is it important that the Statement may represent the "views" or "understanding" of undisclosed British officials. An official statement, by its very nature, is a description of the facts as seen by the government, as well as a declaration of the views and beliefs of that government as expressed through its proper officials; the identity of the particular individual is neither required nor important, so long as the certification of the officer reveals his title and his authority to make the Statement. It is always "His Majesty's Government" which is speaking.[12]

[12] Consistently with its Statement, the British Ministry, on October 20, 1952, returned to respondent a check in the amount of $12,000 forwarded to it by respondent as payment for reductions in the war risk premium. This return was accompanied by a letter, signed by the Ministry's Director of Finance, which stated in part:

"Notwithstanding that the British Ministry of War Transport was a signatory to the charter party under which

Accordingly, under the governing authorities this Statement, received through diplomatic channels, is clearly admissible as an official statement of the British Government which should have have been received and unequivocally accepted as giving the position and understanding of that Government in 1941 and thereafter. *Ex parte State of New York,* 256 U. S. 503, 509; *Culbertson* v. *Witbeck Company,* 127 U. S. 326, 330; *Hardison Seed Co.* v. *Jones,* 149 F. 2d 252, 256–257 (C. A. 6); *Banco de Espana* v. *Federal Reserve Bank of New York,* 114 F. 2d 438, 443, 444–445 (C. A. 2); *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 253 Fed.

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the voyage was made, as you are aware, it took no part in the negotiations leading up to the executioin of the charter and in fact executed the charter upon the request of the United States Government. When the charter was executed by the British Ministry of War Transport, there was an understanding between both Governments that the British Ministry of War Transport was acting as agent only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission. All bills submitted under the charter were subjected to audit by officers of the Commission and payment of the amounts found to be admissible was made by the Commission.

"In the circumstance that you recognized the competence of the United States Maritime Commission in the matter of audit and payment of the bills submitted by you under the charter and the fact that the United States Government was the real party in interest, it is considered that it would be improper for this ministry to accept any monies due from you under the terms of the charter or to give you a valid or full discharge of your obligations in return for such payment."

152 (S. D. N. Y.), modified on another ground, 258 Fed. 363 (C. A. 2); *The Rogdai,* 278 Fed. 294 (N. D. Cal.).[13]

We stress that we do not rest only upon the evidentiary point that the Tax Court formally excluded the statement, a ruling which the court below apparently approved but on which it refused to "rule directly" (App. A, *infra,* p. 39). The main defect of both opinions below is that, even when they purported to consider the document, the courts admittedly failed to accord it full significance as a conclusive statement by the *British Government,* one of the three interests involved in this transaction, as to its part and participation as well as its contemporaneous understanding. If this "Statement by His Majesty's Government" had not been so slighted, it surely would have compelled both lower courts to the opposite holding.

(c). Since the Renegotiation Act was primarily directed at excessive profits from "government"

[13] The cases relied on by the Tax Court (R. 298) are distinguishable and irrelevant. In *Gilbert* v. *Gulf Oil Corp.,* 175 F. 2d 705 (C. A. 4), the preparer of the letter was in court and there was no need to fall back on the letter. In *United States* v. *Grayson,* 166 F. 2d 863 (C. A. 2), the author clearly was not an official of the agency whose records were involved. In *Franklin* v. *Skelly Oil Co.,* 141 F. 2d 568 (C. A. 10), the instruments were not prepared in accordance with the statute authorizing the document and hence were incompetent. And in *Von Zedtwitz* v. *Sutherland,* 26 F. 2d 525 (C. A. D. C.), and *Guettler* v. *Alfsen,* 289 Fed. 613 (C. A. D. C.), it is not clear that statements purporting to be official statements of a government were involved.

or "appropriated" funds (*W. Tip Davis,* 12 T. C. 335), and to goods or services "the ultimate payment for which was, in any event, to come from the Government" (*Lichter* v. *United States,* 334 U. S. 742, 765), it plainly accords with the Act's objective to hold that respondent had a renegotiable contract with the Government of the United States (acting through the Maritime Commission). As we have shown (*supra,* pp. 4–6, 11–18), it was the understanding of all three interests—the Commission, the shipowners, and the British Government—that the Commission was definitely a party to the transaction. All payments came from appropriated funds in the federal treasury, without reimbursement. Grossly excessive profits appear to have been made from war contracts executed because of a felt national need.[14] The

[14] The court below made some significant remarks indicating doubt as to whether respondent's profits were in fact excessive (App. A, *infra,* pp. 30–32). Not only was this issue not before the court but also, since it concerns the determination of excessive profits, it is beyond the court's jurisdiction even to consider. *United States* v. *California Eastern Line, Inc.,* 348 U. S. 351, 354. The reason for the denial to the Courts of Appeals of jurisdiction over the determination of excessive profits is that the Tax Court, in contrast to the Courts of Appeals, has "special familiarity with all kinds of business and accounting practices in regard to profits, losses, etc." *United States* v. *California Eastern Line, Inc., supra,* pp. 354, 355. The Tax Court has not yet passed on the issue of the excessiveness of the profits (*supra,* p. 7, fn. 5).

In contrast to the observations of the court below, see *Lichter* v. *United States,* 334 U. S. at 760–765, 767–768; the Commission's determination that over 45% of the total

spirit and purpose of the Renegotiation Act thus combine with the known realities of history and this particular transaction to warrant the elimination of undue profits on the "Red Sea" agreements.[15]

3. While the court below merely summarized its conclusion, apparently agreeing in full with the Tax Court (App. A, *infra*, pp. 30, 33, 40), the latter undertook to detail its reasons, which cannot withstand challenge. The court's major grounds (apart from the fact that the British Ministry was the formal signatory on the charter, which we have already discussed) were (1) that in May 1941, the time here involved, the Commission was without authority to enter into a space charter (R. 294–295) and (2) that the related "Red Sea" cases in which Government-owned vessels were bareboat-chartered to private companies and then space-chartered to the British show that the Commission was not the charterer here (R. 293–294).

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amount received by respondent represented excessive profits (*supra*, p. 6); and the conclusion of the House Committee on Merchant Marine and Fisheries, which conducted an inquiry into the "Red Sea operation", that the charter rates "were too high, and exceedingly so" (H. Rep. No. 2088, 78th Cong., 2d Sess.).

[15] It has sometimes been suggested that the Maritime Commission was the agent and the British Ministry the principal. We believe this to be a reversal of the true roles, but even if it be accepted the charter would still be renegotiable. A contract made by an agent can be an agreement with him as well as his principal, particularly if the agent is to make all the payments with his own money and to perform all the actions required by the contract.

Both of these reasons rest on a clear misapprehension of the significant differences between bareboat or vessel charters, and space charters.

The court's ruling that the Commission was without authority to enter into space charters is based on a statement to a Congressional Committee by the Commission's Chairman, seeking enabling legislation, that "[u]nder existing law, the Commission is not authorized to *procure vessels* by charter" (emphasis added) (R. 294, 295). But respondent's charter was not the procuring, hiring or chartering of a *vessel*, but the leasing of *space* on the *Vermont*. The distinction between the two types of charters is well-established in the authorities as well as in maritime practice; in a "space" charter the charterer pays for space provided on the ship for the shipment of his cargo and the vessel remains under the operating control of the owner, while a "bareboat" charter provides for the renting of the entire vessel for a specified period and the charterer retains complete possession and control of the entire vessel. *The Steel Inventor*, 35 F. Supp. 986, 994 (D. Md.); *Dampskibsselskabet* v. *Oil Co.*, 310 U. S. 268, 278. Cf. *Calmar Steamship Corp.* v. *United States*, 345 U. S. 446. Not only is there nothing in P. L. 101, Section 3 (a), 77th Cong., 1st Sess., 55 Stat. 242, 243, 50 U. S. C. App. 1273,—the legislation enacted pursuant to the Maritime Commission's request—dealing with space char-

ters,[16] but, since a space charter is nothing more than a contract for the carriage of goods on equipment owned by a carrier, it is the kind of contract for services which traditionally has been entered into by Government agencies under the authority of 41 U. S. C. 5, authorizing such agencies to enter into contracts for services. Of course, 41 U. S. C. 5 requires the use of advertising except "when the public exigencies require the immediate delivery of the articles or *performance of the service,*" [emphasis added] but it is undeniable that the critical situation in 1941 was a "public exigency."

The court's reference to the Red Sea charters of Government-owned vessels is likewise fallacious. As the court noted, the Commission leased Government-owned vessels on bareboat charter to shipowners for operation, and these vessels then engaged in Red Sea voyages under space charters, which were similar to the charter here and on which the British Ministry was also a signatory (R. 293). But such chartering does not mean that "[t]he Commission clearly was not the charterer in these contracts * * *; otherwise the leasing of the ships to the operators by the Commission would seem to have been an incom-

[16] P. L. 101, on its face, authorizes the Commission to hire or procure vessels by bareboat and time charters but is completely silent on the subject of charters of space for transportation service. The legislative history similarly is silent on space charters, apparently because there was no question that such charters were already authorized.

prehensible act of futility" (R. 293). Under a bareboat charter, the charterer becomes the owner *pro hac vice* and mans, victuals and supplies the ship whereas under the space charter the Commission chartered back only the right to space on the vessel; the vessel remained under the control and operation of the steamship companies. See *supra,* pp. 21–22. By this device, which is commonly used in the maritime field, the Commission placed into the Red Sea service its own vessels, secured an operator for them (who would assume all the risks so entailed), and obtained additional space for transportation to the Red Sea. Any other procedure would have required the Commission to retain control of the vessels and to operate them, which it did not desire to do.

4. Finally, both courts below disregarded the significant circumstance that, apart from the Commission's role in the formal charter, there was a valid agreement between respondent and the Commission which is fully subject to renegotiation in its own right. As we have shown (*supra,* pp. 3–6, 11–13), respondent agreed with the Commission as to every last detail; this agreement, which included a provision for a formal charter with the British Ministry, continued to exist side by side with the formal charter executed by respondent and the British. This agreement was undeniably made with a "Department" under the Renegotiation Act (*infra,* p. 42).

The Statute of Frauds presents no obstacle, both because it does not apply to maritime contracts (*Union Fish Company* v. *Erickson,* 248 U. S. 308, 314) and because there were sufficient writings by the Commission and respondent's representatives. Also, it is clear that a binding oral or informal contract in maritime matters is not superseded by a subsequently executed written charter which does not incorporate all the terms and obligations of the earlier contract. *United States Navigation Co.* v. *Black Diamond Lines, Inc.,* 124 F. 2d 508 (C. A. 2), certiorari denied, 315 U. S. 816. Here, the valid informal agreement between respondent and the Commission must have remained in effect after the formal charter, if the latter bound only respondent and the British Ministry. Since the charter did not bind the Commission—according to respondent—the earlier agreement which contemplated the charter would not have been superseded. The profits resulting from that earlier, still subsisting, agreement are therefore fully subject to renegotiation, even if the later charter be viewed as a contract solely with the British Government.

A Tax Court renegotiation proceeding is completely *de novo* and *not* a "proceeding to review the determination" of the renegotiating agency (Section 403 (e) (1), (2) of the Act) (App. B, *infra,* pp. 42–44). For that reason the Tax Court can properly, on remand, renegotiate the informal

contract, regardless of whether or not the Commission limited itself to consideration of the formal charter in its renegotiation proceeding. Once a renegotiation *proceeding*—as distinguished from the renegotiation of a specific contract—is properly instituted by the renegotiating agency, the Tax Court can consider additional contracts. See, *e. g., Bibb Mfg Co.* v. *Secretary of War,* 12 T. C. 665; *Spray Cotton Mills,* 9 T. C. 824.[17]

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER, *Attorney.*

MAY 1956.

[17] Despite some suggestion in the opinion below that the Renegotiation Act was not intended to cover contracts made before its passage (App. A, *infra*, p. 32), there is now no doubt that the Act was intended to apply, and can validly be applied, to contracts made before its enactment (on April 28, 1942), if final payment had not been made by that date. *Lichter* v. *United States*, 334 U. S. 742, 788–789; *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841; *Ring Constr. Co.* v. *Sec'y of War*, 178 F. 2d 714 (C. A. D. C.), certiorari denied, 339 U. S. 943; *Blanchard Machine Co.* v. *R. F. C.*, 177 F. 2d 727 (C. A. D. C.), certiorari denied, 339 U. S. 912. The Tax Court has not yet passed on the issue of whether final payment was made before April 28, 1942 (*supra*, p. 7).

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

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No. 11448

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR TO THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS

v.

CALIFORNIA EASTERN LINE, INC., RESPONDENT

On Petition for Review of Decision of The Tax Court of the United States

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Decided February 16, 1956

Mr. Frederick N. Curley, Attorney, Department of Justice, with whom *Mr. Edward H. Hickey,* Attorney, Department of Justice, was on the brief, for petitioners. *Mr. Samuel D. Slade,* Attorney, Department of Justice, also entered an appearance for petitioners.

Mr. Robert E. Kline, Jr., for respondent.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge:* The controversy here presented arose under the Renegotiation Act, as amended.[1] The Tax Court by its decision and

[1] Act of April 28, 1942, 56 Stat. 245, as amended, 50 U. S. C. App. § 1191 (1952).

order of February 26, 1952, ruled that there was presented no renegotiable contract within § 403 (c) (1). See 17 T. C. 1325 (1952). When the Government filed its petition for review, we were first confronted with a jurisdictional question because of lack of the proper parties. See 92 U. S. App. D. C. 207, 204 F. 2d 398 (D. C. Cir. 1953). When next before us, we dismissed the petition for review for lack of jurisdiction, for reasons stated in 93 U. S. App. D. C. 289, 211 F. 2d 635 (D. C. Cir. 1954). Rehearing en banc by this court having been denied, certiorari was granted, 348 U. S. 810 (1954), and the Court thereafter held that "the Tax Court's decision in this case is . . . subject to the normal type of review authorized by § 1141." *United States* v. *California Eastern Line,* 348 U. S. 351, 355 (1955). It thereupon became our duty to review the Tax Court's determination, and in doing so we have proceeded "in the same manner and to the same extent as [with] decisions of the district courts in civil actions tried without a jury." [2]

Since, from the various opinions cited the facts appear in sufficient detail, we present only such background as is required to highlight the basic problem. In 1941 the Maritime Commission assembled some 2,000,000 tons of merchant shipping, including an intercoastal ship "VERMONT" owned by California Eastern Line, Inc. The Commission negotiated the terms of a charter between the owner and the British Ministry of War pursuant to which the "VERMONT" sailed

[2] 26 U. S. C. § 1141 (a) (1952); Lichter v. United States, 95 U. S. App. D. C. 316, 221 F. 2d 869 (D. C. Cir. 1955), *cert. denied*, 24 U. S. L. WEEK 3094 (U. S. Oct. 10, 1955).

for a Red Sea port with supplies for use in the African campaign. After the VERMONT'S departure, May 29, 1941, the charter was formally signed by the owner and by a representative of the British Ministry of War and expressly ran between the signatories. The Government claims that the British acted on behalf of and as agent for the Maritime Commission, but the Tax Court specifically found to the contrary and upheld the owner's contention in this respect. The Commission, from Lend-lease funds appropriated by the Congress for the purpose, paid the owner about $351,000 as charter hire, of which the amount of $164,000 was later determined by the Maritime Commission to be "excessive profits," said to be subject to renegotiation. The shipowner thereupon petitioned the Tax Court for relief, asserting that the charter was not subject to renegotiation, because (a) it was not made with the Maritime Commission, but with Great Britain;[3] (b) "final" payment under the charter was made June 23, 1941, hence the Act of April 28, 1942, could not apply;[4] and (c) the renegotiation was commenced more than one year after the close of the contractor's fiscal year within which the contract had been completed.[5]

Judge Raum's able opinion concluded:

> Respondent's contention, that the British Ministry acted as the Commission's agent and that the Commission was the charterer of the Vermont, is based on the

[3] § 403 (c) (1) of the Renegotiation Act of 1942, note 1 *supra.*

[4] *Id.* § 403 (c) (6).

[5] *Id.* § 403 (c) (3).

facts that the Commission negotiated the terms and form of the charter, exercised supervision over performance under the charter, and, in behalf of the United States Government, furnished the funds and controlled payment under the charter. We think it does not necessarily follow, under the Renegotiation Act, that these circumstances stamped the charter as being a contract with the Commission. The question of fact remained whether on the entire evidence the charter was such a contract. As the repository of these very important powers, the Commission might have chosen in some circumstances to charter the Vermont itself, making all other arrangements substantially the same as it did here, and to undertake transportation of the British cargo to the destinations at which it was required. Whatever the reasons may have been, whether because of lack of authority or because of restrictions on its action which exigencies of the international situation then imposed on the United States as a non-belligerent, the fact is that the Commission avoided selection of this course. It chose rather that in which the British Ministry was the charterer and in which the contract was with the British Ministry; to itself the Commission relegated the function of making the arrangement and tending to other matters in a way which would make it possible for the British Ministry to charter the Vermont. The contract in fact was, and was intended to be, with the British Ministry and not with the Commission. Cf. *Waterman S. S. Corporation* v. *Land*, 151 F. 2d 292, 293–296 (C. A. D. C.), reversed on other grounds, sub. nom.

> *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 * * * 17 T. C. 1325, 1341–42 (1952).

The Government in its brief says:

> In this Court, the questions presented are: (1) Whether the Tax Court erred in excluding certain evidence offered by petitioners in support of their defense, and (2) whether the holding by the Tax Court that the contract in question was not a contract with the Commission within the meaning of Section 403 (c) (1) of the Renegotiation Act was warranted by and consistent with the subsidiary findings of fact made by that court. No question is raised as to the validity of any of the subsidiary findings of fact, most of which were based on stipulated facts.

Because of the earnest insistence by the Government that the Tax Court's findings must fall, we have carefully examined the entire record and the scores of exhibits included. Not only do we conclude that there has been demonstrated no error affecting substantial rights, but on the same record, we would in all probability have arrived at the same result as did the Tax Court. The Government seems really to have been persuaded by its firm conviction that the profits were in fact excessive and should have been recaptured, at least to the extent of $164,000. Such a view is understandable, yet, from the very outset the Commission must have known exactly what its cost problem was. Its May 23, 1941, minutes disclose its plan

> * * * for the execution of a space charter between the vessel owners and the British

> Ministry of War Transport. A copy of the proposed form of charter is attached. It provides that the owner of the vessel will receive 75¢ per cubic foot on the total bale cargo capacity of his vessel and, if any cargo is carried on deck, 60¢ per cubic foot on actual measurement of such cargo * * * For example, on a vessel with 400,000 cubic feet of bale cargo space and no cargo carried on deck, the vessel owner will be paid $300,000 for the voyage to Suez * * *

The space charter of the very craft here involved called for a payment of the full sum of $336,577, which was made June 23, 1941, as the Tax Court found.

No one then was asking Congress to authorize the rewriting of charter-hire or, in the alternative, the requisitioning of the vessels whose owners might refuse to risk their loss in Red Sea wartime voyages or to accept disruption of their own service to their own loss. Replacements for ships lost were hard to find and costs were high. The movement of vast quantities of explosives was involved. The extent of the hazard was unknown. Shipping was at a premium, indeed commercial rates at the time amounted to $1, or more per cubic foot. Every vessel could profitably be employed in neutral waters without the possibility of need for repairs at some distant port unequipped to deal with emergency conditions. What, if any, return cargoes could be picked up was uncertain. Above all, the urgent need in 1941 for expedited delivery of war supplies commanded arrangements which in different and later stages of the war were otherwise to be scrutinized and better controlled. But in May

1941, the plain and well realized fact was that the Commission had no effective legal control over space charter rates. Congress conferred no power over charter rates generally until long after the vessel had sailed and delivered her cargo.

Even when the Renegotiation Act was first considered as § 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Congress did not seek retroactively to reach excessive profits paid for supplies sold or transportation service rendered to the nations with which we later were allied. Nor did the Commission, possessed of the facts, seek such authority, indeed its minutes for November 19, 1942, disclose the Chairman had called a conference with the owners of various "Red Sea" vessels to seek a voluntary rebate plan.

> "From our investigation," he said "we now are convinced that the rates were too high, and exceedingly so, and it is my feeling that the various steamship owners should voluntarily make a refund, thereby remedying the situation. If that is not done, no doubt the Comptroller General will report the results to the Congress, and you may be assured that we will be confronted with an investigation by some committee, with results which, in my opinion, will be injurious to the American merchant marine."

In this case, not until November 27, 1943, was an effort made to set in motion the renegotiation procedures. Not until 1949 was a "determination" made.

By letter of March 22, 1943, the Chairman reported to Congressman Hart, Chairman, Special Subcommittee on Charter Rates, House Committee on the Merchant Marine and Fisheries:

> The Commission did not pay the charter hire, in this instance or others, at the time under discussion. It approved the rates to be paid. In obtaining the use of ships on a voluntary basis, the Commission undertook to correlate and direct traffic. Charters were made between the shippers and the owners. . . . In the case of the Red Sea voyages, the ships were chartered by their owners to the British Ministry of War Transport. The charter hire was paid out of lend-lease funds allocated for the purpose, presumably on account of the problem of exchange involved.

As of March 29, 1943, referring to correspondence "relating to certain space charters between the British Ministry of War Transport and American owners of vessels for carriage of lend-lease material to the Red Sea," the Chairman informed the Comptroller General's office that Commission counsel had "advised that the application of the renegotiation statute was doubtful (1) as to all of the charters because the United States was not a party thereto, and (2) as to those charters on which final payments had been made prior to the enactment of the renegotiation act."

And so the record goes, overwhelming the suggestion that the British Ministry of War Transport was the agent in any capacity for the Gov-

ernment of the United States or for any of the Departments enumerated in the statute.

But, the Government now says, despite what the terms of the charter were, and irrespective of the Commission's own understanding of the transaction, the Tax Court's findings and conclusions must be reversed because of the British Government's view as to its understanding of the relationship which prevailed in 1941.

This understanding, it is argued, is to be discerned from a "statement" which was excluded by the Tax Court. Calling attention to the pendency of this case which "will be the lead case in a series," the Department of Justice asked the Department of State to procure from the British Government an official "statement" as to the relationship "between the United States Government and the British Government" at the time the charters were executed. In due course, back through channels came a certificate which reads:

> "I, Frederick Victor Cross, an Assistant Secretary of the Ministry of Transport, HEREBY CERTIFY that the document hereto attached and marked 'A' is a STATEMENT based on Information extracted from documents preserved in the archives of the Ministry of Transport (formerly the Ministry of War Transport); and that to the best of my knowledge and belief, it is a TRUE STATEMENT.
>
> F. V. CROSS.
>
> 18th January, 1951.
> Ministry of Transport,
> Berkeley Square House,
> London, W. 1."

The attached statement appears in the margin.[6]

While it is true that the document was excluded, it is equally clear that the Tax Court carefully considered the claims of the respective

[6] "Statement by His Majesty's Government as to the circumstances under which certain American vessels were made available for the carriage of war supplies to the Red Sea Area in 1941.

"1. His Majesty's Government, early in 1941, requested the United States Government, and the United States Government agreed, to furnish certain shipping tonnage necessary to the prosecution of the War in which His Majesty's Government was then engaged. The United States Government agreed to furnish such tonnage at its own expense and no arrangement for reimbursement by His Majesty's Government has been, or will be, made.

"2. Such tonnage was, during 1941 and 1942, furnished by means of certain charters with various shipowners covering voyages to Red Sea ports, commonly referred to as 'Red Sea Charters', a list of which is attached hereto.

"3. His Majesty's Government took no part in the negotiations with the shipowners leading up to the execution of said charters.

"4. At the request of the United States Government, the British Ministry of War Transport, a representative of His Majesty's Government, signed the charters as negotiated and drafted by the United States Maritime Commission and the shipowners. The signature by the representative of His Majesty's Government was requested by the United States Government on the ground that it was necessary to meet *formal* requirements. No charters were in fact executed by the representative of His Majesty's Government until after the receipt of a letter dated June 9, 1941 from the Office for Emergency Management to the effect that the obligations of the charters would be met by the United States Maritime Commission on behalf of the United States Government.

"5. When the representative of His Majesty's Government signed the above-mentioned charters, it was under-

parties with reference to it. We previously had occasion to note that the Tax Court after examination of the statement concluded: "that even upon that basis the Government did not establish its point."[7]

Government counsel, steadfast as ever throughout this prolonged litigation, zealously argued to us that the Tax Court was legally bound to admit as evidence the "official statement" of the British Government and thereupon to accept, as proved from that statement, such purported facts as would establish that the British Ministry of War Transport acted as the agent of the Maritime Commission. It would then follow—counsel say—that the charter did not run between the named parties, but was in fact a contract between the shipowner and the Maritime Commission.[8]

Thus the Tax Court's decision would be caused to depend upon the conclusions drawn in 1951

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stood that His Majesty's Government in signing said charters were agents only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission.

"6. The bills submitted by the shipowners under said charters to His Majesty's Government were forwarded to the United States Maritime Commission for payment. In forwarding such bills, the representatives of His Majesty's Government certified merely that the services specified had been performed."

[7] United States v. California Eastern Line, 93 U. S. App. D. C. 289, 211 F. 2d 635 n. 13 (D. C. Cir. 1954).

[8] Compare the analysis by Chief Judge Groner in Waterman S. S. Corporation v. Land, 80 U. S. App D. C. 167, 151 F. 2d 292 (D. C. Cir. 1945), *rev'd on a jurisdictional point*, 327 U. S. 540 (1946).

from unidentified documents in British archives, by some Assistant Secretary of the Ministry of Transport, with no showing as to his competence so to act, if he personally did act, and with no identification as to who compiled the "statement" if it were not Mr. Cross. An "Acting Assistant Attorney General," while this case was pending, asked that the British authorities supply the "statement" for use as evidence here. It was described as "vitally important" to the Government's position. Yet our Government must have had access to all Maritime Commission files as well as to other official American departmental files. It surely could have called as witnesses Admiral Land, former Commission chairman, and various other officials who, in the day and time of the transaction, had firsthand knowledge of all pertinent facts. Despite the availability of American sources, to accord to the proffered evidence any such force as is now sought for it would do violence to the understanding of many as to the basis for a "public document" exception to the hearsay rule. The Government cites as authority such cases, among others, as *Ex parte State of New York*, 256 U. S. 503 (1921); *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 253 F. 152 (S. D. N. Y. 1918) and *Culbertson* v. *Witbeck Co.*, 127 U. S. 326 (1888).

The Tax Court considered the document and commented thus:

> Nowhere in the certificate of the Assistant Secretary of the Ministry of Transport is there any representation that the attached document represents the official views of the British Government; he certi-

fies merely that the statement is "based on information extracted from documents preserved in the archives of the Ministry of Transport," and that to the best of his knowledge and belief it is a true statement. The statement itself does not appear to be an official record, nor is it an official statement of the views of the British Government. It merely incorporates information said to be collected by some unidentified person, and said to have been "extracted" from unidentified and undescribed documents. There are here none of the safeguards in the presence of which the hazards of hearsay evidence and of the absence of cross-examination are risked. Contrary to respondent's contention, Exhibit G does not satisfy the conditions under which official statements are admitted in exception to the hearsay rule. Cf. *Gilbert* v. *Gulf Oil Corp.*, 175 F. 2d 705, 710 (C. A. 4); *United States* v. *Grayson*, 166 F. 2d 863, 868–869 (C. A. 2); *Franklin* v. *Skelley Oil Co.*, 141 F. 2d 568, 572 (C. A. 10); *Von Zedtwitz* v. *Sutherland*, 26 F. 2d 525, 526 (C. A. D. C.); *Guettler* v. *Alfsen*, 289 Fed. 613, 614 (C. A. D. C.). We point out, furthermore, that even if Exhibits G and H were admitted, they would not, taken together with all the other evidence, cause us to change any of our conclusions as to the facts as we have found them. Even in the presence of these exhibits, which reflect at best only the "view" or "understanding" of certain unidentified persons, the evidence in its entirety establishes to our satisfaction that in fact the British Ministry neither acted nor was intended by the Commission to act as the Commission's agent in entering into

the Vermont charter, and that the charter was not with the Commission, 17 T. C. 1325, 1340–41 (1952).

We need not rule directly upon the admissibility of the document or decide that it shall have "the force of proof" [9] or that it is any more than a statement of the contentions of the Government as a litigant. It certainly is not offered by the British Government in its own behalf. We regard it as immaterial in the light of the whole record, the facts as stipulated, and the exhibits. Whether the British Government held the view or "understood" that we should earlier have entered the war, or that the United States was transporting for its own account war goods purchased by Great Britain for use by the latter in the African campaign, or that its Ministry of War Transport was acting as our Government's agent for the accomplishment of our nation's objectives is beside the point. That we had a purpose is well known. Our own Government took careful, planned and cautious steps to carry on this transaction for the benefit "of the democracies," as President Roosevelt said in his April 30, 1941, letter to the Commission. The whole operation was "part of the defense effort to which this country is committed." [10] For reasons deemed valid by the Executive, means were then adopted to make certain that at the bar of history, the United States would not ap-

[9] Compania Espanola v. Navemar, 303 U. S. 68, 75 (1938); cf. Von Zedtwitz v. Sutherland, 58 App. D. C. 153, 154, 26 F. 2d 525 (D. C. Cir. 1928).

[10] McCauley v. Waterman S. S. Corp., 327 U. S. 540, 542 n.2 (1946).

pear as a belligerent, or as committing an act of war or as offering, under American auspices, a target to the aggressor. The measures were designed to protect our status, and the Commission saw to it that the documents reflected that status. That they were sufficient, as the Tax Court concluded, we agree.

Thus, it has not been shown that the Tax Court's findings are clearly erroneous, or that its conclusions lack substantial support in the record. Such a result is in harmony with the Congressional purpose as stated in the Renegotiation Act, quite apart from the changed circumstances after our entrance into the war and the more expanded controls which followed.

The contract was not subject to renegotiation as one made with the Maritime Commission, or as a subcontract thereunder. Moreover, the Tax Court found that there was a "full payment" on June 23, 1941; whether it was "final" so as to be beyond renegotiation since made prior to April 28, 1942, was not decided, but had it been, a substantial basis for a conclusion of finality can be discerned. We make no comment on the date of commencement of proceedings in relation to the petitioner's fiscal year. We have said enough to indicate why, in our judgment, this litigation has had its day.

Affirmed.

JUDGMENT

Pursuant to the judgment of the Supreme Court this case came on for rehearing on the record from the Tax Court of the United States, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the decision of the Tax Court of the United States on review in this case be, and the same is hereby, affirmed.

Dated: FEBRUARY 16, 1956.

Per Circuit Judge Danaher.

Filed, FEBRUARY 16, 1956.
JOSEPH W. STEWART,
Clerk

Supreme Court of the United States

No. ———

October Term, 1955

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, PETITIONERS, *vs.* CALIFORNIA EASTERN LINE, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 23, 1956.

(Sgd) EARL WARREN,
Chief Justice of the United States.

Dated this 9th day of May 1956.

APPENDIX B

The Renegotiation Act of 1942, as amended (56 Stat. 245, as amended, 50 U. S. C. App. 1191, *et seq.*), provides in pertinent part:

> SEC. 403 (a). For the purposes of this section—
>
> (1) The term "Department" means the Department of the Army, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.
>
> * * * * *
>
> SEC. 403 (c) (1) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, to require the contractor or subcontractor to renegotiate the contract price. * * *
>
> * * * * *
>
> SEC. 403 (e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1) of this section, file a petition with The Tax Court

of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by The Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * *

(2) Any contractor or subcontractor excluding a subcontractor described in subsection (a) (5) (B) of this section aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits which is not embodied in an agreement with the con-

tractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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No. 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, *Petitioners*,

v.

CALIFORNIA EASTERN LINE, INC., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

For the convenience of the Court, the opinion of the Tax Court is set forth in Appendix B, *infra*, pp. 12a-41a. The opinion of the Court of Appeals is set forth in Appendix C, *infra*, pp. 42a-54a. It has now been reported in 231 F. 2d 754.

STATUTES INVOLVED

In addition to sections of the Renegotiation Act of 1942, as amended, set forth in Appendix B to the Petition (pp. 42-44), respondent has also set forth in

Appendix D, *infra,* p. 55a, parts of Section 403(c)(6) of said Act (P.L. 528 77th Cong., 2d Sess., as amended by P.L. 753, 77th Cong., 2d Sess.), under which section the Renegotiation Act is made inapplicable to contracts where final payment was made prior to April 28, 1942, and which requires that the renegotiation proceeding be commenced within one year after the close of the fiscal year within which completion of the contract occurred.

Parts of Sections 9 and 37 of the Shipping Act, 1916, as amended, (46 U.S.C. 808, 835), are also involved and are set forth in Appendix D, *infra,* pp. 55a, 56a.

QUESTION PRESENTED

The Government does not take issue with the legal proposition that unless the charter here involved (App. A, *infra,* pp. 1a-11a) were with a named Department of the United States, the contract is not covered by the Renegotiation Act. The Government insists, however, that although the Maritime Commission was not a signatory to this charter providing for the shipment of war materials and although the charter was executed by the British Ministry of War Transport at a time when the United States was adhering to a policy of proclaimed neutrality, nevertheless the Maritime Commission became a party to the charter upon the remarkable theory that the British Government, a belligerent nation, acted as agent for the then neutral United States in signing the charter.

The Tax Court, after a full hearing on this coverage issue, found and decided that the subject contract in fact was, and was intended to be, with the British Ministry of War Transport and not with the Maritime

Commission. It held, therefore, that the contract was not subject to renegotiation since it was not with a department named in Section 403(a) of the Renegotiation Act of 1942, as amended. (App. B, *infra,* pp. 39a, 41a).

The Court of Appeals, after a review of the full record including the scores of exhibits, affirmed the decision of the Tax Court. In its opinion the Court of Appeals held that it had not been shown that the Tax Court's findings were clearly erroneous or that its conclusions lacked substantial support in the record. The Court of Appeals found that our Government had taken careful, planned and cautious steps to protect our then neutral status and that it deliberately avoided becoming a party to the charter to make certain that at the bar of history it would not appear as a belligerent. The Court of Appeals concurred in the finding that the contract was not one made with the Maritime Commission. (App. C, *infra,* pp. 53a, 54a).

The question thus presented to this Court is whether it should undertake to review this case for a third time, despite the concurrent findings of two courts below which are almost entirely factual in nature.

A seasoned and wise rule of this Court makes concurrent findings of two courts below final in the absence of a very exceptional showing of error, which is not present here. (See cases cited, p. 15, *infra*).

Moreover, even if this Court were to grant certiorari and reverse the decisions below, this would not finally dispose of the case, which has already been in litigation for almost thirteen years. (See pp. 16, 17, *infra*). Significantly, the Court of Appeals concluded: " . . . in our judgment, this litigation has had its day." (App. C, *infra,* p. 54a).

STATEMENT

It is stipulated that by charter dated May 29, 1941, respondent as owner of the SS VERMONT entered into a written contract with the British Ministry of War Transport as charterers of said vessel, and that said contract was signed for and on behalf of respondent and the said British Ministry by their duly authorized representatives. (R. 39). It was not signed by the Maritime Commission as a party, but only approved by it. (R. 39, 40, 97).

Apart from the plain terms of the charter itself and the identity of the signatories thereto, the stipulated facts also make it clear that the British Government was acting as principal on its own behalf and not as agent for the Maritime Commission in executing the charter, that the British Government was the real party in interest, that it alone was obligated under the terms of the charter, and that it alone obtained the benefits derived from the charter.

The Stipulation of Facts, which clearly demonstrates the careful plan of the Maritime Commission to preserve our neutral status and to avoid being a party to the charter, establishes the following:

In the spring of 1941 the Maritime Commission undertook to assemble a pool of shipping for use by the British Government to transport large quantities of British war materials to the Red Sea area. (R. 44, 165). Among the vessels so assembled was the SS VERMONT, belonging to respondent. (R. 57, 58). In April and May, 1941, the Maritime Commission undertook to negotiate the terms of charter for these vessels, including the SS VERMONT, and a series of conferences and exchanges of letters followed, all of which are

reflected in the record. (R. 44, 58, 62-67, 71-75, 83-86, 91, 92, 165-167).

By May 10 it had been determined that the charterer would be the war shipping agency of the British Government (R. 64), and on May 14, this was made clear to the shipowners. (R. 74).[1]

On May 28, the day before the vessel sailed, respondent was furnished with copies of the charter in its completed state, wherein the British Ministry of War

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[1] Petitioners' assertion, appearing at page 5 of their brief, that "During the course of the negotiations, it was explicitly recognized by the shipowners, including respondent, that the 'Maritime Commission will be a party directly or indirectly to the transaction'" is clearly unwarranted. The isolated communication referred to (R. 72) was considered by the Tax Court and disposed of by a footnote:

> "In one instance, during the negotiations on the terms of the proposed charter, a ship company official in arguing for a particular arbitration clause designed apparently to settle disputes through some medium other than the Commission, wrote in a communication dated May 13, 1941, that the 'Maritime Commission will be a party directly or indirectly to the transaction'. He seemed, in this, to be alluding to the Commission's part in arranging and negotiating the charter. If he meant any more, it became clear in later correspondence that he was speaking too broadly; the reply to that communication by a Commission official showed that the understanding between them was that an arm of the British Government was expected to be the charterer, the Commission official referring to the 'charterer, who proposed to be British Ministry of Shipping'. The same thought appears in the letter of another Commission official written shortly thereafter to the representatives of another ship company, the letter stating that 'We have confirmed that the British Ministry of War Transport may be the charterer. However, we are unable to state today that this will be so inasmuch as there are certain details yet to be discussed by us with the British Ministry of War Transport'. During the succeeding days it became completely settled that the British Ministry of War Transport was the charterer." (App. B, *infra*, p. 34a, n. 11).

Transport was named as charterer and which required its signature as such. (R. 47, 92).

The signed charter dated May 29, 1941 (App. A, *infra,* pp. 1a-11a), states that the agreement is between California Eastern Line, Owners of the SS VERMONT, and the British Ministry of War Transport, Charterers. All the benefits flowed to the British. It called for the carriage of British war materials to the Red Sea Area. The British, in turn, undertook to pay the freight and other incidental charges. The British had the privilege of securing commercial or other lawful cargo to complete the ship to insure charterer's use of its maximum capacity, the revenue from such extra cargo to be credited to the charterer.

The Maritime Commission appears only as the Arbitrator of any dispute that might arise between respondent and the British, and it was provided that the charter was not to become effective until approved by the Maritime Commission.

Sir T. A. Sparks, who as Representative in the United States signed the charter, was duly authorized by the British Ministry of War Transport to execute said contract *for and on its behalf.* (R. 40).

The contract was approved by the Maritime Commission, as required by Sections 9 and 37 of the Shipping Act, 1916, (App. D, *infra,* pp. 55a, 56a), since the charter of a vessel to an alien was involved. (R. 40, 95-98).[2]

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[2] There is a vast difference between signing as a party, and *approving* as representative of the government agency charged under Sections 9 and 37 of the 1916 Act (App. D, *infra*, pp. 55a, 56a) with the duty of approving charters to an alien. Such approval would have been unnecessary if the Commission were the charterer and a party to the contract.

Under this charter, the VERMONT presented herself at the port of New York, was loaded with British war materials supplied by the British Ministry, and departed for the Red Sea on May 29, 1941, where she arrived and completed discharge on August 8, 1941. (R. 40). Although the charter was not signed until June 10, 1941 when the vessel was at sea (R. 106), all the terms had been fully agreed upon, including who was to be the charterer, and copies of the charter in final form had been furnished to respondent before the vessel sailed. (R. 47, 92). Full payment of the freight was made under the charter on June 23, 1941 (R. 40, 49, 134-137), while the vessel was still at sea but after the charter had been signed by both parties.

On November 27, 1943, almost thirteen years ago, the Chairman of the United States Maritime Commission commenced a renegotiation proceeding with respect to the profits realized under this charter. On March 31, 1949 he issued a unilateral order determining that respondent had realized excessive profits in the amount of $164,000. (R. 15, 16). Respondent petitioned the Tax Court for a redetermination of the alleged excessive profits. Under the Renegotiation Act, the Tax Court proceeding is not to be treated as a review of the departmental determination, but as a proceeding de novo. Sec. 403(e)(1) Renegotiation Act, 1942 (Pet. p. 43).

Respondent moved for and was granted a severance of the basic question of whether this specific charter was covered by the Renegotiation Act. (R. 25-31, 38). Under an agreed Statement of Issues (R. 38, 39), the issues presented to the Tax Court for its determination were limited to the following: (a) Was the charter dated May 29, 1941 between respondent and the British Ministry of War Transport a contract, or a subcontract

thereunder, with a "Department" as defined in the Renegotiation Act? (b) Was the final payment pursuant to said charter made prior to April 28, 1942? (c) Was the renegotiation proceeding commenced by the Chairman of the United States Maritime Commission within one year after the close of the fiscal year of the respondent within which completion of said charter occurred? (d) Was the charter subject to renegotiation? A full hearing was had on these severed coverage issues, in the course of which most of the facts were stipulated and some 90 exhibits were introduced.

The Tax Court found that the contract was not with the Maritime Commission or any other Department covered by the Renegotiation Act, but rather with an agency of a foreign government. It held, therefore, that the contract was not subject to renegotiation. (App. B, *infra*, pp. 39a, 41a). Consequently, it did not reach the other issues presented.

The United States petitioned the Court of Appeals for the District of Columbia Circuit for review of the Tax Court's decision. The Court of Appeals first held that it did not have jurisdiction to review the Tax Court's decision. 211 F. 2d 635. This Court, however, reversed. 348 U.S. 351. The Court of Appeals thereupon considered the case on the merits, and affirmed the Tax Court's decision.

WHY THE WRIT SHOULD BE DENIED

1. The two courts below have thoroughly considered and properly disposed of this case

The record was thoroughly reviewed by the Tax Court and by the Court of Appeals, as a reading of their opinions clearly demonstrates. The Court of

Appeals specifically stated that in reviewing the Tax Court's determinations it proceeded "in the same manner and to the same extent as (with) decisions of the district courts in civil actions tried without a jury" (App. C, *infra*, p. 43a), and that it "carefully examined the entire record and the scores of exhibits included". (App. C, *infra*, p. 45a). The Court of Appeals affirmed the Tax Court's findings not only on the ground that no reversible error affecting substantial rights existed, but also on the ground that on the same record it would in all probability have arrived at the same result as did the Tax Court (App. C, *infra*, p. 45a).

(a) The record amply supports the findings below that the Maritime Commission was not a party to the charter.[3]

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[3] There is no merit in the Government's assertion that, although the executed charter was with the British Ministry of War Transport, there was an earlier oral contract with the Maritime Commission which would be subject to renegotiation. If any binding oral contract existed at the time the ship sailed, it was clearly identical in terms and between the same parties as the written agreement executed shortly thereafter. The charter in final form was before the parties when the ship sailed. Upon execution of the written agreement any earlier understanding became integrated and merged into the executed charter, as evidenced by the retroactive effective date of the charter and by the fact that performance was completed and the freight was paid under the written agreement. *Brawley* v. *United States*, 96 U.S. 168, 173. *United States Navigation Co.* v. *Black Diamond Lines, Inc.*, 124 F. 2d 508 (C.A. 2), cited by petitioners (Pet., p. 24), is not inconsistent with this legal principle. Furthermore, consideration of any alleged oral contract with the Maritime Commission is precluded by the Agreed Statement of Issues submitted to the Tax Court, which restricts the issues in this proceeding to the written charter dated May 29, 1941 between respondent and the British Ministry of War Transport. (R. 38, 39).

The charter (App. A, *infra*, pp. 1a-11a) is clear in its terms. It definitely states that the British Ministry of War Transport is the charterer. All the benefits ran to the British, and by its terms the British were obligated to pay the freight and incidental expenses. Indeed, the Government concedes that within the four corners of the charter there is nothing to suggest that the Maritime Commission was a party. (Pet., p. 10).

Moreover, the surrounding circumstances serve to support the plain terms of the charter, rather than to vary them.

The official minutes of the Maritime Commission and the staff memoranda on which its actions were based clearly reveal that the Maritime Commission intended that the British Ministry, and not itself, be the charterer of this vessel (R. 86-89, 92-98). No one, including the British, was ever authorized to sign the contract on behalf of the Maritime Commission. To bind the Commission such authority would have had to be given by formal Commission action and officially recorded. Merchant Marine Act, 1936, as amended, Sec. 201(c), 46 U.S.C. 1111. It is beyond comprehension that the Maritime Commission would authorize the British Government, a belligerent nation, to act as the secret agent of the United States, a neutral nation, to carry munitions into the war area. The only authority ever given by the Maritime Commission was for one of its officials to *approve* the charter (as distinguished from executing it) as required by Sections 9 and 37 of the Shipping Act, 1916 (R. 40, 97), since charter to an alien was involved. There would have been no need for such approval if the Maritime Commission were the charterer. In fact, the Maritime Commission did not believe it had authority to enter into such a charter. (R. 226). It undertook to cooperate with the British Government

only within the bounds of our then declared neutrality, and the Maritime Commission carefully refrained from signing the charter or becoming a party to it. (R. 165).

There is no basis for the Government's contention that, because the charter hire and other expenses were paid out of lend-lease appropriations allocated to the Maritime Commission for that purpose, the Maritime Commission in fact was a party to the charter. To the contrary, there was nothing in the international arrangement implementing these payments to connote any modification in the terms of the charter or any change in the identity of the parties. This international arrangement, to which respondent was not a party, is included in the Stipulation of Facts. (R. 105, 106). It categorically recites that lend-lease funds were being advanced to make payments *required to be made by the British Ministry of War Transport under the terms of the charter.* Clearly, Great Britain still had the duty of seeing that all of its obligations under the charter were carried out, and arrangements were being made only for the United States to advance from lend-lease funds the payments the British were required to make. The settlement agreement with respect to British lend-lease accounts arrived at in 1945 after the war was over, which balanced credits against debits and waived part of the remainder (R. 193, 197, 200, 201), establishes beyond question that the obligation to pay was British, and remained so notwithstanding the lend-lease arrangement. In fact, Congress recognized that lend-lease accounts were not covered by the Renegotiation Act. See p. 15, *infra.*

It must not be forgotten that in the spring of 1941 and before Pearl Harbor, the United States was not at war and our prime consideration at the time was

to avoid becoming involved. Of course, the United States was concerned with the fate of the democratic nations at war with the Axis powers, but it was recognized that any assistance had to be extended within the bounds of our then declared neutrality as expressed by Congress in the Neutrality Act of 1939 and paramount in the minds of the people. Hence, the care taken by the Maritime Commission to avoid doing anything that might jeopardize our declared neutral status and its deliberate and planned purpose to refrain from becoming a party to the charter. (R. 165). Now that the exigencies of the international situation that existed in the spring of 1941 have passed into history, the Solicitor General seeks to sweep aside the precautions taken by the Maritime Commission during that critical pre-war period to preserve our neutral status, in an effort to obtain a purported statutory basis for this renegotiation proceeding. The plain fact of the matter is that at the time the contract was made the Maritime Commission did not intend to and deliberately refrained from becoming a party to the charter. The lower courts' findings that there was no contract with the Maritime Commission are clearly supported by the record.

(b) Petitioners assert that a so-called "official statement" of the British Government (Exhibits G and H, R. 270-276) should be taken as *conclusive proof* that the charter was signed by the British Ministry of War Transport as agent for the Maritime Commission.

To begin with, this purported agency relationship was never disclosed to respondent, and indeed at no time before the Tax Court proceeding was there the slightest intimation that the British Ministry of War

Transport was acting as agent for the Maritime Commission in signing the charter. This is clearly an afterthought on the part of the Government, and the assertion is in direct contradiction of the actual fact (see pp. 25a, 39a, 48a, 54a, *supra*), as the Courts below found.

Furthermore, the proffered exhibits do not qualify under the "official statement" exception to the hearsay rule. An examination of these exhibits fails to reveal any representation that they set forth the official views of the British Government, or that Great Britain is speaking officially through its Foreign Office, its Ambassador, or someone qualified to speak officially for that Government. These exhibits contain a statement incorporating information collected by some unidentified person and said to have been "extracted" from unidentified and undescribed documents preserved in the British archives. There is no showing of the competence of the person who prepared the statement to arrive at the conclusions expressed therein, and certainly no evidence of any authority in him to speak officially for the British Government. In transmitting the document the British Ambassador did not adopt the statement as his own or see fit to make it an official statement of his Government. Neither did the Department of State give it sanction.

It was therefore entirely proper for the Tax Court to exclude these exhibits. *Gilbert* v. *Gulf Oil Corp.*, 175 F. 2d 705, 710 (C.A. 4); *United States* v. *Grayson*, 166 F. 2d 863, 868-869 (C.A. 2); *Franklin* v. *Skelly Oil Co.*, 141 F. 2d 568, 572 (C.A. 10); *Von Zedtwitz* v. *Sutherland*, 26 F. 2d 525, 526 (C.A.D.C.); *Guettler* v. *Alfsen*, 289 Fed. 613, 614 (C.A.D.C.).

Even if admitted, the exhibits would have no more than evidentiary force and effect; they certainly could

not be accepted as *conclusive* of the issue. *Compania Espanola* v. *The Navemar,* 303 U.S. 68; *"The Pesaro",* 255 U.S. 216; *Republic of Mexico* v. *Hoffman,* 324 U.S. 30; *Ex Parte Muir,* 254 U.S. 522, 532-533.

But most important, the Tax Court, while technically excluding these exhibits, actually did take them into account, and stated that they would not, considered together with all the other evidence, cause it to change its views. (App. B, *infra,* p. 37a). The Court of Appeals regarded them as immaterial in light of the whole record. (App. C, *infra,* p. 53a). Therefore, no prejudicial error could have resulted from their exclusion.

2. The decision in this case can have no important effect on the purposes and operation of the Renegotiation Act

The decision below, holding that this contract was with an agency of the British Government and not with the Maritime Commission, even if erroneous, which clearly it is not, could not "frustrate" the purposes and operation of the Renegotiation Act. The decision is so limited in scope and its application so restricted to this and the other Red Sea charters, it could not possibly have the far-reaching effects the Government portends.

Moreover, it must be remembered that Congress proposed under the Renegotiation Act to reach only contracts with certain named departments, among them the Maritime Commission. It did not purport to cover *all* Government contracts, and certainly not pre-war contracts where final payment had been made and performance had been completed. As the Court of Appeals said (App. C, *infra,* p. 47a):

> "Even when the Renegotiation Act was first considered as § 403 of the Sixth Supplemental

National Defense Appropriation Act, 1942, Congress did not seek retroactively to reach excessive profits paid for supplies sold or transportation services rendered to the nations with which we later were allied . . ."

It is most significant that, when the 1943 amendments to the Renegotiation Act were being considered, it was recognized that pre-war contracts made directly with the foreign governments but paid for out of lend-lease funds were not covered by the Act. The House Naval Affairs Committee *recommended* that the Act be amended to included them. H. Rept. 733, 78th Cong., 1st Sess. 25, 26, 59. Congress, however, did not see fit to do so.

3. There is no substantial question of law involved and no conflict with any other decision. To grant certiorari where as here there are concurrent findings of two courts below would be improvident

The principle of law which the case presents is not in dispute and the Government does not assert any conflict with other decisions. It is conceded that unless the Maritime Commission were a party, the contract is not covered by the Renegotiation Act.

Petitioners challenge only the findings of facts made by the courts below, and it requests this Court to review those facts. This Court, however, has consistently held that certiorari will not be granted to review concurrent findings by two courts below. *Corn Products Co.* v. *Commissioner,* 350 U. S. 46, 51, *re-hearing denied,* 350 U.S. 943; *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 214; *Allen* v. *Trust Co. of Georgia,* 326 U.S. 630, 636; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local,* No. 123, 321 U.S. 590, 605.

4. Assuming that the charter were found to be with the Maritime Commission, this would not be dispositive of the litigation

(a) The Tax Court would still have to redetermine the amount of excessive profits, if any. Despite the Solicitor General's attempt to color his petition with many assertions of excessive profits, the fact remains that the Tax Court has made no such determination.

Furthermore, in affirming, the Court of Appeals advanced some cogent reasons why the charter hire paid under these Red Sea charters was not excessive. It states (App. C, *infra*, p. 46a) that unless the owners had received the 75¢ per cubic foot agreed upon, they might have refused to risk the loss of their vessels "in Red Sea wartime voyages or to accept disruption of their own service to their own loss. Replacements for ships lost were hard to find and costs were high. The movement of vast quantities of explosives was involved. The extent of the hazard was unknown. Shipping was at a premium, indeed commercial rates at the time amounted to $1, or more per cubic foot. Every vessel could profitably be employed in neutral waters without the possibility of need for repairs at some distant port unequipped to deal with emergency conditions. What, if any, return cargoes could be picked up was uncertain." These observations find support in the record. (R. 166). It is therefore improper for the Government to *assume* that there were excessive profits under this contract in the absence of any such determination by the Tax Court, and particularly where the facts support a contrary conclusion.

It should also be observed that this was not a war contract, but a contract made in the pre-war era, when

our Government was still neutral. There was no attempt on the part of Congress to control profits during this pre-war period. To the contrary, when Congress came to pass the first renegotiation law on April 28, 1942, it did not see fit to dip into the past and seek to control profits arising under contracts that had already been performed prior to its enactment.

(b) Two alternative coverage issues would also have to be decided before the case could be finally disposed of.

It is respondent's further contention that *final payment* was made under this charter prior to April 28, 1942, and that for this reason also the contract was excluded from renegotiation. Renegotiation Act of 1942, Sec. 403(c)(6)(i) (App. D, *infra*, p. 55a). This question was not reached by the Tax Court, but as the Court of Appeals said, (App. C, *infra*, p. 54a): "Moreover, the Tax Court found there was a 'full payment' on June 23, 1941; whether it was 'final' so as to be beyond renegotiation since made prior to April 28, 1942, was not decided, but had it been, a substantial basis for a conclusion of finality can be discerned."

In addition, respondent contends that the contract was completed on August 8, 1941, the date the cargo was delivered at Port Sudan and accepted by the British agent. The renegotiation proceeding was not commenced until November 29, 1943. This was more than one year after the close of the fiscal year in which the contract was completed, and for this reason also the contract was not subject to renegotiation. Renegotiation Act of 1942, Sec. 403(c)(6) (App. D, *infra*, p. 55a). Again the Tax Court did not reach this issue,

but the Court of Appeals concluded its opinion by saying (App. C, *infra,* p. 54a): "We make no comment on the date of commencement of proceedings in relation to the petitioner's (respondent's) fiscal year. We have said enough to indicate why, in our judgment, *this litigation has had its day.*"

CONCLUSION

For the above reasons, respondent respectfully submits that the Government's petition for a writ of certiorari should be denied.

ROBERT E. KLINE, JR.

LOUIS J. GUSMANO
Attorneys for Respondent

June 22, 1956.

APPENDIX A

CHARTER

May 29, 1941

IT IS THIS DAY MUTUALLY AGREED between CALIFORNIA EASTERN LINE, INC. Owners of the Steamship VERMONT of 3524 tons net register, classed A. 1. American Bureau now at New York and BRITISH MINISTRY OF WAR TRANSPORT Charterers, as follows:

1.—That the said steamship, being tight, staunch and strong, and in every way fitted for the voyage and, according to Builders' scale and plan, which Owners believe to be correct but do not guarantee, has 412,242 cubic feet bale space available for cargo, and shall load at not more than two United States Atlantic Coast ports, north of Cape Hatteras, but not east of Portland, Maine, according to custom of port, a cargo of lawful merchandise, which Charterers shall furnish subject to Clause 25, and being so loaded shall therewith proceed as ordered when Bills of Lading are signed to not exceeding two ports of discharge in the Gulf of Aden and the Red Sea range not beyond Suez, or so near thereunto as she may safely get, and there, always afloat, deliver the cargo as customary, at such wharf, dock or other good and safe place as Charterers' Agents may direct on arrival, in consideration whereof Charterers shall pay the vessel freight as follows:

Seventy-five cents (75¢), United States Currency, net per cu. ft., on the bale cargo capacity, as above stated.

For on-deck cargo Sixty cents (60¢), United States Currency, net per cu. ft. on cubic measurement of such cargo carried.

Entire freight to be prepaid, without discount, and except as provided in clause 2 (Two), to be considered as earned and not returnable, vessel and/or cargo lost or not lost.

If the Charterers find it necessary to discharge at port or ports other than in the range named above then the Charterers may order the vessel to discharge at not exceeding two ports in any one of the following ranges:

Capetown-Mombasa
Persian Gulf
Karachi-Bombay

If under these circumstances vessel discharges in ranges last named, the Owners shall refund to Charterers the following sums:

(a) Port or ports in Capetown—Mombasa range—*Thirty cents* (*30*) per cubic foot bale space on which original freight was paid and *Twenty-four cents* (*24¢*) *per cubic foot of cubic measurement of on-deck cargo;*

(b) Port or ports in Persian Gulf *Twenty cents* (*20¢*) per cubic foot bale space on which original freight was paid and *Sixteen cents* (*16¢*) *per cubic foot of cubic measurement of on-deck cargo;*

(c) Port or ports in Karachi-Bombay range *Twenty-five cents* (*25¢*) per cubic foot bale space on which original freight was paid and *Twenty cents* (*20¢*) *per cubic foot of cubic measurement of on-deck cargo*

Vessel shall not be required to discharge in more than one range.

Confirmation of discharging ports as ordered on sailing to be given on vessel's arrival off Mombasa within 12 hours. If longer detained awaiting orders, such additional time to count as lay days.

2.—If by reason of changed conditions the Owners and Charterers agree, or in case of disagreement, the United States Maritime Commission determines, that the voyage shall not be prosecuted further or not completed, and the vessel is not lost and does not discharge at a port or ports, Capetown or beyond, adjustment of freight shall

be made on the basis of U. S. $2,250.00 per day vessel is used by Charterer.

3.—Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations. Steamer to have liberty to call at any port or ports en route, or not, for fuel, and/or supplies.

4.—Charterers to have the privilege of designating wharves, or other good and safe places for loading or discharging. The cargo to be brought to, and taken from alongside the Steamer, at Charterers' risk and expense, any custom of the port to the contrary notwithstanding. Lighterage, if any, at discharging port for the account of the cargo. Steamer to supply steam to drive winches, and to give use of gear on board vessel, also to load or discharge at night, on Sundays or holidays or on day when notice is given if required by Charterers. Charterers to pay all expenses and labor incurred on cargo, including overtime to crew for cargo working purposes.

5.—Charterers are to load, stow, and trim the cargo at their own expense, under the direction of the Master. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including elevating, stevedore, tallying, watching, clerking, top wharfage, and to provide and fill sacks required to secure bulk grain, also all necessary shifting boards, dunnage and dunnage mats, if required, but Owners to pay all other charges at loading port.

6.—Charterers' Agents to pay cost of discharging cargo, and all port charges incidental to the cargo at the discharging port or ports to which steamer may be ordered, but the Owners to pay all other charges at the discharging port or ports.

7.—Charterers to have use of any dunnage or mats, etc., as may be aboard.

8.—The Steamer shall be consigned to Charterer's Agents at ports of loading and discharge, and shall employ their Broker to attend to the Ship's business.

9.—The Charterer's Agents shall sign Bills of Lading in behalf of the Master as and when presented, without prejudice to this charter-party. The captain, officers and crew of the vessel in supervising loading, stowing, trimming, tallying and discharge of cargo shall be deemed the agents of the Charterers, except in so far as such supervision pertains to the safety of the vessel. Except as otherwise provided in this Charter, neither the vessel nor the Owner shall be liable for shortage, damage, breakage, leakage, shrinkage, or any other condition in respect to cargo arising without the actual fault and privity of the Owner and without the fault or neglect of Agents or servants of the Owner.

10.—Lay days at port or ports of loading to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness whether vessel is in berth or not. Should the Steamer not be ready to load on or before noon of ....., the Charterers have the option of cancelling this charter-party. Lay days at port or ports of discharge to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness whether vessel is in berth or not.

11.—If the Steamer be not sooner dispatched cargo to be loaded and discharged in a total of ten (10) running days. Should the cargo not be loaded at loading port or discharged at port of destination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day, the sum of Twenty-two hundred fifty ($2250.00) Dollars, United States Currency, per day demurrage, any detention through Quarantine to Vessel not to count in lay days. Lay days allowed for loading and discharging are reversible. Lay days not to include time steaming between ports.

12.—The clauses herein regarding payment of port charges, stevedores, etc., at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at Charterers' disposal, which would be used for cargo, if loading for Owner's account, and where cargo has been carried before.

13.—Throughout this charter-party the following are always mutually excepted: The act of God; perils or accidents of the sea; causes beyond the shipowners or Charterers control; restraint or interference or compliance with any directions whatsoever by any Government; fire from any cause whatsoever or wheresoever occurring, unless caused by the actual fault or privity of the Owners or Charterers, as the case may be; war, hostilities, rebellion or civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies, pirates, riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any voyage not resulting, however, from Owner's want of due diligence. Notwithstanding anything to the contrary in this charter-party, the Owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14.—Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this charter-party.

15.—The bale capacity of 412,242 cubic feet according to builder's plan excludes deep tank with a total bale capacity of 25,000 cubic feet. Freight is not payable on the deep tank space unless cleaned, fitted, and in every way made usable for cargo by Owners.

16.—This charter-party includes, and all bills of lading issued hereunder shall include, subject to clause 1 of this charter, Chamber of Shipping War Clauses 1/2/3/ August 1937:—

War Risks Clause

"1. The Master shall not be required or bound to proceed to any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or reach nor to sign bills of lading for any such port.

"2. (A) If any port of discharge named in this charter-party or to which the vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

"(B) If owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port or discharge of cargo intended for any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach such discharging port—the cargo or such part of it as may be affected shall be discharged at any other safe port in the vicinity of the said port of discharge as may be ordered by the Charterers (provided such other port is not blockaded or that entry thereto or discharge of cargo thereat is not in the Master's or Owners' discretion dangerous or prohibited). If no such orders be received from the Charterers within forty-eight (48) hours after they or their agents have received from the Owners a request for the nomination of a substitute discharging port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on and such discharge shall be deemed

to be due fulfilment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of cargo being discharged at any such other port the Owners shall be entitled to freight as if the discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses.

"3. The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

"If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the vessel may proceed to any safe port which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports originally

designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses."

17.—This charter-party includes, and all bills of lading issued hereunder shall include the New Jason Clause, reading:—

"In the event of accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods."

General average, if any, to be according to York-Antwerp Rules, 1924, Rule F, 1/15 inclusive and 17/22 inclusive, Owners shall be entitled to appoint General Average adjusters.

18.—This charter-party includes, and all bills of lading issued hereunder shall include the Both-to-Blame Collision Clause reading:—

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her

owners in so far as such loss or liability represents loss of or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

19.—All bills of lading issued hereunder shall include the Clause Paramount reading:—

Carriage of Goods by Sea Act of 1936

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

20.—A regular line bill of lading on booking agents' form to be used and all such bills of lading covering Charterer's cargo to be claused as follows: "All terms and conditions and exceptions of charter-party dated New York, May 29, 1941, are hereby incorporated." This clause will not appear on bills of lading for commercial cargo, but Charterer's Agents to cover the Owner's liability with separate P & L coverage.

21.—Charterers to comply with all Government regulations relating to loading, stowage and discharge of dangerous cargo.

22.—Charterers shall be responsible for fulfilment of all requirements of Neutrality Act 1939 of the United States including any amendments thereof and all proclamations,

rules and regulations thereunder so far as they relate to cargo.

23.—On-deck cargo to be carried at sole discretion of Master and at the risk of Charterers and/or Owners of such cargo.

24.—The freight to be paid under this charter is predicated on obtaining war risk insurance at a rate of 5% into the Red Sea on a valuation of Eight hundred thousand ($800,000.00) Dollars. Any increase in this war risk insurance rate into the Red Sea to be added to the total freight, and any reduction to be deducted.

25.—Charterer has the privilege of securing commercial or other lawful cargo to complete ship, or fill broken stowage space, to insure charterers securing maximum use of ship's capacity. The revenue on such cargo, less cargo handling expenses, P&I insurance premiums to cover B/L risk, deduction for cargo claims, brokerage if any and a commission of 5% to the booking agent (named in clause 8) to be credited to the Charterer.

26.—Vessel to be berthed in United States ports at piers or terminals and to use facilities designated by the Charterer and approved by an authorized representative of the United States Maritime Commission. Consideration will be given to the use of Owner's terminals and facilities where practical.

27.—Charterers have privilege of appointing booking or loading agents in the United States approved by the United States Maritime Commission, but Owners not required to pay for this service in excess of one-fourth cent (¼¢) per bale cubic as above, subject to a maximum of One Thousand Dollars ($1,000). Charterer's Agents to be used at discharge ports and for which agency fees will be allowed in an amount not exceeding one hundred and twenty-five dollars ($125) for each port.

28.—This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission.

CALIFORNIA EASTERN LINE, INC.,

By: R. A. NICOL,
President.

BRITISH MINISTRY OF WAR TRANSPORT,

By: T. A. SPARKS,
Representative in the U. S. A.

Approved

UNITED STATES MARITIME COMMISSION,

By: G. H. HELMBOLD,
Director, Operations and Traffic.

APPENDIX B

17 T. C. No. 159

THE TAX COURT OF THE UNITED STATES

Docket No. 870-R

CALIFORNIA EASTERN LINE, INC., PETITIONER

v.

CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, RESPONDENT

Promulgated February 15, 1952.

Where the British Ministry of War Transport entered into a space charter for the hire of petitioner's steamship, and the charter was financed with Lend-Lease funds provided through the United States Maritime Commission, which also cooperated in negotiating the charter and supervising aspects of performance under it, *Held*, the charter was not a contract with the Maritime Commission, within Section 403(c)(1) of the Renegotiation Act, and therefore was not renegotiable.

Harold B. Finn, Esq., and *Robert E. Kline, Jr., Esq.*, for the petitioner.

Frederick N. Curley, Esq., and *James H. Prentice, Esq.*, for the respondent.

Respondent determined by unilateral order, under the Renegotiation Act, as originally enacted in 1942,[1] that

[1] The statutory provisions involved were enacted as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (56 Stat. 245). In making amendments to the foregoing provisions, Section 701 of the Revenue Act of 1943 (58 Stat. 78) retroactively provided that Section 403 of the foregoing 1942 legislation may be cited as the "Renegotiation Act."

profits realized by petitioner on a war contract were excessive to the extent of $164,000. Petitioner brought this proceeding to redetermine its excessive profits on that contract. On its motion for a severance of issues, the trial was limited to whether petitioner's profits under that contract were subject to renegotiation. Thereafter, the parties stipulated that there are now presented for decision the following questions under the provisions of the Renegotiation Act: (1) Whether the war contract was a contract or subcontract with a "Department" named in that Act. (2) Whether "final payment pursuant to such contract or subcontract" had been made prior to April 28, 1942. (3) Whether renegotiation was commenced more than one year after the close of petitioner's fiscal year in which "completion" of that contract had occurred. Determination of any of these questions in petitioner's favor obviates consideration of those remaining, and requires decision for petitioner.

FINDINGS OF FACT

The facts stipulated by the parties are found as stipulated, and the written stipulation and accompanying exhibits are incorporated herein by reference.

California Eastern Line, Inc., is a corporation organized under the laws of Delaware, and has its principal office at Vancouver, Washington. Effective March 16, 1942, it acquired all the assets and assumed all the liabilities of an Oregon corporation of the same name. The Oregon corporation prior to that date, and the Delaware corporation thereafter, will be referred to as the "petitioner". Petitioner owned a steamship named the "Vermont", which was operated in the United States intercoastal trade.

At all times material hereto, petitioner kept its books and filed its Federal income tax returns on the accrual basis and for a calendar year; except that for 1942 the bookkeeping and tax period of the Oregon corporation ran

from January 1 to March 16, while the Delaware corporation accounted for the remainder of the calendar year.

The national defense program in 1941 required mobilization of American facilities for ocean transportation. President Roosevelt communicated with Admiral Emory S. Land, Chairman of the United States Maritime Commission (hereinafter referred to as the "Commission"), to assure satisfaction of ocean shipping needs, and on February 25, 1941, the Commission created a Division of Emergency Shipping to handle emergency transportation problems and to supervise sales, charters, transfers, requisitions, reallocations and reassignments of all vessel tonnage in connection with emergency transportation. In April 1941 the President directed Admiral Land to secure at least 2,000,000 tons of merchant shipping in the service of the defense effort. On April 10, 1941, the President issued a proclamation modifying the existing ban on American vessels against sailing in certain combat areas, and made it lawful for American vessels to proceed through the Gulf of Aden into the Red Sea as far as Port Said.

At that time, the British Purchasing Commission had acquired war equipment and supplies in the United States, and shipping facilities were needed to transport that portion of the equipment and supplies to North Africa as might be assigned to that theatre of operations. In this connection, the British Government sought shipping facilities under the American Lend-Lease program, and for this purpose a "Requisition For Defense Articles", dated May 15, 1941, was submitted to American authorities by the British Government.

With knowledge of the President's directives, Commission officials held informal discussions with certain American shipowners during April 1941. On April 25, 1941, a meeting was called and attended by Commission officials to point out to these shipowners or their representatives

that wessels were needed to transport cargo to the Red Sea area for the British, and to work out an arrangement with the shipowners by which to secure the tonnage needed for this operation. Petitioner was represented at this meeting. Thereafter, to secure the necessary tonnage and to fix the terms under which the supplies and equipment were to be transported in this operation, further conferences were held, between Commission officials and shipowners or representatives of American vessels, in 1941 on May 3, 7, 9, 13, 16 and 21. Petitioner was also represented at these conferences.

In its discussions and dealings with the Commission, petitioner was represented by C. E. Dant (hereinafter referred to as "Dant"), of the States Steamship Company, and by R. A. Nicol (hereinafter referred to as "Nicol"), president of R. A. Nicol & Co.

On or about April 26, 1941, in a letter to Nicol, the Commission's Director of Emergency Shipping confirmed an understanding with Dant and Nicol reached on April 25, 1941, for the latter to make available the Vermont and other ships in response to the Commission's request for allocation of vessels to the "North Atlantic/Red Sea service". Thereafter Dant and Nicol, on the one hand, and officials of the Commission, on the other, communicated with each other by letter and telegram concerning conditions on which the "Vermont" was to be provided for the Red Sea operation.

Commission officials and the shipowners or their representatives negotiated the terms under which the Vermont and the other ships involved were to be hired or "chartered" for the Red Sea operation, including the charter rates according to which the shipowners were to be paid. Petitioner, through Dant and Nicol, participated in these negotiations with the Commission. Agreement was reached between the Commission officials and the

owners on the terms of a "space charter"[2] to cover the Red Sea operation, and a draft of the charter was then prepared and submitted to the Commission for its approval. The following explanation, given to the Commission in a memorandum dated May 21, 1941, from its Director of Operations and Traffic, describes the arrangements made between Commission officials and the shipowners for the Red Sea operation:

> Pursuant to the direction of President Roosevelt to the Chairman on April 30, 1941, the Division of Emergency Shipping has thus far arranged for the employment of about 43 United States flag vessels in service to the Red Sea. It is expected that approximately 12 or 15 vessels will sail during the present month and about 25 during June.
>
> The vessels in question are owned by a number of companies normally engaged in trade elsewhere than to the Red Sea. In order to concentrate the operations in as few hands as possible, we have arranged for the vessels to be loaded by the berth operators—in this case, American Export Lines and Isthmian Steamship Lines. The vessels will be spotted and loaded under the supervision of one or the other of these companies who will also book any commercial cargo for which space may be available.
>
> Our plans call for the execution of a space charter between the vessel owners and the British Ministry of War Transport. A copy of the proposed form of char-

[2] The "space charter" was explained as follows in a letter from Admiral Land to Congressman Edward J. Hart: "Under the usual space charter arrangement, the shipper [the charterer] paid on the basis of the total cubic content of the ship, delivering to the vessel whatever he wanted to go, and the vessel owner took care of all expenses of loading and discharging". Admiral Land added that, in order to get a lower charter rate, in this case the cost of loading and discharging the cargo was assumed by the charterer.

ter is attached. It provides that the owner of the vessel will receive 75¢ per cubic foot on the total bale cargo capacity of his vessel and, if any cargo is carried on deck, 60¢ per cubic foot on actual measurement of such cargo. Out of this, the owner must pay all expenses of the voyage (except cargo expense for loading; discharging expense abroad being assumed by the British Government), including an agency fee to the berth operator of ¼¢ per bale cubic foot, not to exceed $1,000. The berth operator will book such commercial cargo as may be available and necessary to fill out the space not used by the British Ministry of War Transport, and, on this, he receives a commission of 5% which is, of course, deductible from the revenue. For example, on a vessel with 400,000 cubic feet of bale cargo space and no cargo carried on deck, the vessel owner will be paid $300,000 for the voyage to Suez; the agent will receive $1,000 as an agency fee and, if commercial cargo with a total revenue of, say, $75,000 is booked by him, he will also obtain $3,750 in commission.

The British Ministry of War Transport will secure reimbursement for the amounts paid to the vessel owner and for the amounts paid for loading British cargo on the vessel (which is not included in the above-mentioned charter rate) from Lease-Lend funds. In the example cited above, they will secure $300,000 plus the loading expense of British Ministry cargo less the net revenue secured from commercial cargo after deduction of cargo handling expense, agents commissions, etc.

The loading operations of the United States flag vessels involved in this program will take place at New York and Philadelphia. At New York, the American Export Lines and Isthmian Steamship Lines have arranged to lease adjoining piers at Staten Island under a guaranty of rental by the British Ministry of War Transport. * * *

> While all of these vessels are expected to clear for Suez, conditions at that port may render advisable discharge at some other port in the range between Capetown and Bombay and the charter makes provision for this as well as for rate adjustment in such an eventuality. Upon completion of discharge of the outward cargo, the charter terminates and the vessel is open for other employment homeward to the best advantage, depending upon our particular needs for transporation at that time.

* * * * * * * * * *

At its meeting of May 23, 1941, the Commission approved this memorandum with two exceptions: (1) That the proposed charter be made "subject to modification in accordance with the form of charter ultimately approved by Commission"; (2) That payment under the charter be made directly by the Commission to the owners from the allocated Lend-Lease funds; and that the berth operator should remit direct to the Commission, as a credit to Lend-Lease funds, "freight revenue collections on commercial cargoes less commissions and cargo loading expenses". Thereafter, at its meeting of May 29, 1941, the Commission also made the proposed form subject to certain additional requirements: (1) The Commission prescribed the manner of ascertaining the cargo capacity of each ship. (2) It designated the formula for determining demurrage and adjustment in the freight charges. (3) It dealt with valuation for purposes of war risk insurance, as well as the minimum amounts of war risk insurance to be provided on ships on which the Commission held mortgages. As modified and conditioned in all the foregoing respects, the Commission approved the proposed charter "for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport, under arrangements heretofore made in cooperation with the Commission or which may hereafter be so made", and designated the officials authorized to approve in behalf of the Commission

specific charters with particular shippers in the approved form.

This approval by the Commission of the form of charter was given, first, in the Commission's capacity as the government agency charged with mobilization and supervision of shipping resources, as the negotiator of the terms of the charters to be executed by the shipowners, and as the source from which funds were to be obtained for payment of the charter of the ships. Secondly, the Commission's approval was given in order to satisfy the requirements of Sections 9 and 37 of the Shipping Act of 1916, as amended (46 U. S. C. Secs. 808, 835), which, in the circumstances specified, required such approval where ships owned by citizens of the United States were chartered to non-citizens of the United States. Thirdly, some of the vessels involved were subject to mortgages held by the Commission, and approval of the Commission as mortgagee was required. Petitioner also needed Commission consent to a charter of the Vermont for the Red Sea operation because, on acquiring that ship, it had agreed with the Commission not to use the Vermont in foreign commerce for a ten-year period from July 21, 1937; that consent, in the form of a conditional waiver of this prohibition, had been given earlier at a meeting of the Commission on May 6, 1941.

During the course of the negotiations between the Commission officials and the shipowners, it was understood by all the negotiating parties, including petitioner, that the British Government would probably be the charterer under the charter covering the Red Sea operation. During the period of these negotiations, there was communication between Commission officials and representatives of the British Government concerning matters affecting the Red Sea operation, and by May 15, 1941 the British Ministry of War Transport and the Maritime Commission had come to agree on details concerning use of the Vermont and other ships in the Red Sea operation. Neither the British Government nor any of its agencies or representatives,

however, took part in the negotiations with the shipowners on the terms of the charter of the Vermont or the other ships for the Red Sea operation.

On May 29, 1941, the Vermont, having loaded the cargo which the British Ministry of War Transport furnished at the port of New York, sailed from that port and proceeded to Port Sudan, a port in the Red Sea range. Delivery of that cargo, as directed by agents of the British Government, was finished at Sudan on August 8, 1941. Thereafter the Vermont was worked homeward with commercial cargo for the account of the owners. The homeward journey was undertaken under the direction and with the approval of the Commission.

On May 28, 1941, a Commission official mailed Nicol a copy of a complete draft of the proposed charter. After the Commission's approval of the charter, the same official wrote Nicol about the conditions and modifications inserted by the Commission, and referred to the approved form as "the form of charter which we desire your Company to execute with the British Ministry of War Transport". Nicol was also informed by the official that "We desire this vessel [Vermont] consigned to the American Export Lines, Inc." Copies of the approved charter applicable to the Vermont were mailed to Nicol to be executed in behalf of petitioner; to be forwarded by him to the British Ministry of War Transport for execution in behalf of the British Government; and then to be returned to the Commission. This procedure was followed, and the charter for the Vermont (hereinafter also referred to as the "charter") was signed by Nicol in behalf of petitioner, and by Sir T. A. Sparks in behalf of the British Ministry of War Transport, and thereafter it was signed by a Commission official to show the Commission's approval. These persons were authorized to sign for their respective principals. The Ministry of War Transport was an agency of the British Government.

While execution of the charter was taking place, Nicol raised a question as to the meaning of certain provisions of the charter. Nicol submitted his question to a Commission official, and the two of them reached an understanding as to the matter involved.

The charter was executed after the Vermont had already loaded its cargo at New York and started its voyage. Petitioner sent copies of the charter to the Ministry of War Transport on or about June 3, 1941; Sparks did not sign the charter until about June 10, 1941; and the charter was not returned to the Commission until about June 11, 1941. But by the time the Vermont had been loaded and set sail (May 29, 1941), the terms of the charter had been agreed upon, and the shipowners knew at that time that they and the Ministry of War Transport were to be the parties to the charter.

The charter embodied the provisions described in the memorandum to the Commission quoted above, considered at its meeting of May 23, 1941, except as modified in the manner hereinabove found. The charter stated that it was an agreement between "California Eastern Line, Inc. owners of the steamship Vermont * * * and British Ministry of War Transport Charterers". It specified the cargo space of the Vermont; described the ports at which the cargo was to be loaded and the area in which it was to be discharged; imposed on the charterer the expense of loading and discharging the cargo; and fixed the freight rates to be paid by the charterer, including those applicable in the event of alteration or interruption of the voyage. It contained numerous other provisions, dealing with the charges to be paid petitioner; the loading and unloading of the cargo; the rights and privileges reserved to the owners or the master of the ship; and the incorporation into the charter and bills of lading of clauses dealing with certain matters as war risks, damage and disaster. The charter, further, specifically made provision for certain

powers in the Commission. Thus, it was provided that "Vessel to be berthed in United States ports or piers or terminals and to use facilities designated by the Charterer and approved by the authorized representative of the United States Maritime Commission". Provision was made for an adjustment in the freight charge "If by reason of changed conditions the Owners and Charterers agree, or in case of disagreement, the United States Maritime Commission determines, that the voyage shall not be prosecuted further or not completed * * *". The charter concluded with the provision that "This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission."

By letter of May 31, 1941, Nicol was informed by a Commission official that "The payment of the amounts due under the charter will be made as promptly as possible by the U.S. Maritime Commission from Lease-Lend funds. We are now endeavoring to perfect our procedure under the Lend-Lease Act, so as to insure prompt payment." Commission officials also instructed Nicol as to the procedure to be followed in order for petitioner to obtain payment. Among the documents required to be submitted was a "freight bill" which was to be "certified by an authorized representative of the British Ministry of War Transport in New York". Petitioner understood, during the negotiations on the terms of the charter and at the time it executed the charter, that payment under the charter was to be made from Lend-Lease funds provided by the United States.

On or about June 9, 1941, a representative of the United States Office for Emergency Management wrote the British Merchant Shipping Mission, at Washington, D.C., "with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission".

The United States official stated that the Commission would pay for freight and other specified items, and would receive specified refunds under the charter. Petitioner was not a party to the arrangement so made between these agencies of the United States and British Governments, and was not consulted by either Government as to the terms and conditions of that arrangement.

Petitioner submitted to the Commission the necessary vouchers and documents required for payment under the charter, and on June 23, 1941, petitioner received full payment of the freight payable under the charter in the amount of $336,577. Petitioner credited this sum on its books on or about June 23, 1941, and included it as income in its Federal income and excess profits tax returns for its tax year ending Demember 31, 1941.

On July 31, 1942, petitioner received payment of demurrage in the amount of $14,700, which was paid for extra time used in loading and unloading beyond the ten "lay days" allowed under the charter, and on November 4, 1942, petitioner received reimbursement for overtime paid to the crew for the charterer's account in the amount of $295.78. The demurrage of $14,700 was credited on petitioner's books on September 17, 1942, and the overtime of $295.78 was credited on its books on or about November 4, 1942. Both sums were included as income in petitioner's Federal income and excess profits tax returns for its taxable year ending March 15, 1942.

There was some dispute as to the amounts payable as demurrage and for crew overtime, petitioner submitting claims for these items respectively of $15,265.55 and $722.35. The controversy was between petitioner and the Commission, which audited the claims as submitted by petitioner to the Ministry of War Transport and forwarded by the Ministry to the Commission, and the disagreement was finally settled at the amounts asserted by the Commission.

The full amount of all these payments was made to petitioner by the Commission from Lend-Lease funds appropriated by Congress and allocated by the President to the Commission. These payments were made in accordance with the foregoing communication between the Office for Emergency Management and the British Merchant Shipping Mission.

After completion of the voyage of the Vermont to Port Sudan and of the voyages of other ships chartered in the Red Sea operation, the Commission investigated the results of these voyages and concluded that the owners of the vessels had realized excessive profits. Representatives of the owners were thereafter invited to and attended a meeting of the Commission on November 19, 1942, at which Admiral Land, Chairman of the Commission, stated that "we now are convinced that the rates were too high, and exceedingly so, and it is my feeling that the various steamship owners should voluntarily make a refund, thereby remedying the situation." He suggested that the rates provided in the Red Sea charters be revised, and proposed specific terms for such a revision. Some of the owners thereafter agreed to make a refund, but others did not, petitioner being among those who refused.

On November 29, 1943, petitioner received a letter from the Commission, dated November 27, 1943, signed "John R. Paull, Price Adjustment Board", and captioned "Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation". The letter stated that Price Adjustment Boards had been created in various agencies, including the Commission, to review profits on certain contracts and to determine the existence of excessive profits; that "The renegotiation for your company has been assigned to the Commission's Price Adjustment Board"; that "Notice is given hereby that an initial conference with the Maritime Commission Price Adjustment Board is hereby set for" a time and place

specified in the letter; and that certain indicated information was to be furnished by petitioner at that initial conference.

Under cover of a letter of March 31, 1949 from the aforesaid John R. Paull, there was forwarded to petitioner Order No. 172, signed by W. W. Smith, Chairman of the Commission, and dated and issued on March 31, 1949. This order referred to "a contract with the Departments, as defined in the Renegotiation Act, for the transportation of merchandise and other cargo to ports on the Red Sea, said contract having been entered into on or about May 29, 1941, and involving the chartering of space on the Steamship 'Vermont', the completion of which contract is determined by the undersigned to have occurred in the Contractor's fiscal year ended December 31, 1942". In reference to this contract, it was determined in the order that $164,000 "represents the portion of the Contractor's profits derived from said contract which is excessive within the meaning of the Renegotiation Act".

The charter of the Vermont was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract. The contract contained in that charter was only between petitioner and the Ministry of War Transport, acting for the British Government. The Commission did not intend itself to be a party to that contract or to be the charterer of the Vermont. In entering into that contract and in chartering the Vermont, neither the British Government nor the Ministry of War Transport acted as agent for the Commission.

OPINION

RAUM, *Judge:* The Renegotiation Act, as amended,[3] sought to limit exploitation of the defense effort for private enrichment by directing renegotiation of certain war contracts in order to eliminate "excessive profits." Power to renegotiate was conferred on specified "Department" heads, to whom the Act referred as "Secretaries", but such power was exercisable only with respect to a "contract with such Department or * * * any subcontract thereunder". Sec. 403(c)(1).[4] Commencement of renegotiation was forbidden "more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs". Sec. 403(c)(6). And the Act was made inoperative where "final payment pursuant to such contract or subcontract was made prior to April 28, 1942", the effective date of the Act. Sec. 403(c)(6)(i).

Petitioner entered into a contract which grew out of the needs of the national emergency in 1941, and respondent,

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[3] As pointed out in footnote 1, *supra*, the Renegotiation Act was first enacted as Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 245, 50 U. S. C. App. Sec. 1191. It was amended by Section 801 of the Revenue Act of 1942, 56 Stat. 982; Section 1 of the Military Appropriation Act, 1944, 57 Stat. 347-8; Public Law 149, 78th Cong., 1st Sess., 57 Stat. 564; and Section 701 of the Revenue Act of 1943, 58 Stat. 78.

[4] Although some of the amendments made by the Revenue Act of 1943 were retroactive, the applicable provisions herein were left unaffected in relation to cases controlled by existing statute prior to such amendments. Those provisions are found in Section 403(c), quoted above, as well as in Section 403(a). Section 403(a)(1) defined "Department" to mean "the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company, respectively"; and Section 403(a)(2) defined "Secretary", in the case of the Maritime Commission, to mean "the Chairman of such Commission".

having found that excessive profits were realized on it, seeks their recapture under the Renegotiation Act. Congress authorized renegotiation, however, only where the restrictions it imposed in the Act were satisfied, and it is not enough under the Congressional mandate that, in a general way, excessive profits on a war contract may have been earned and ought to be recovered. The specific conditions imposed by the Act for renegotiation must be met, or else the Act is inapplicable and power to renegotiate is lacking. It is just such an absence of power that petitioner insists characterized respondent's action in this case, asserting that its contract was not "with such Department" but with the government of a foreign country, Great Britain; that "final payment" was made prior to April 28, 1942; and that renegotiation was not commenced within the period limited in the statute after "completion" of the contract.

The contract in its terms supports petitioner's position on the first of these issues, in that it purports to be a contract only between petitioner and an agency of the British Government. Respondent's reply is that in this matter the British Government acted as the agent of the United States Maritime Commission (to which we refer as the "Commission"); that petitioner's contract was therefore with the Commission; and, since the Commission was one of the "Departments" named in the Act, that the contract was renegotiable. The weight of the evidence, however, requires us to reject respondent's premise that the British Government acted as the Commission's agent, and to conclude that the contract was not with the Commission. Accordingly, since it follows that the contract was not subject to renegotiation under the Act, it becomes unnecessary to consider the two remaining objections raised by petitioner.

The factual background of the contract may be briefly stated. In 1941, in accordance with a program for strengthening the position of the United States and other democra-

cies, Congress enacted the so-called Lend-Lease Act (55 Stat. 31, 22 U. S. C. Sec. 411) and the President directed the Commission to build up a shipping pool to be used for defense purposes. The British Government had been acquiring war equipment in the United States, but lacked the necessary shipping facilities to transport it, particularly to the Red Sea area for use in the North African theatre. Accordingly, the British authorities requested the United States to furnish such shipping facilities under the Lend-Lease program, and so long as the necessary shipping was provided, and the British Government was not burdened with payment therefor, the British authorities do not appear to have cared through what arrangements those facilities were furnished. The British request being granted, the task of collecting and making available the required shipping naturally fell to the Commission.

Commission officials summoned and negotiated with various shipowners including petitioner, which owned a steamship named the "Vermont". The officials and the owners, including petitioner, came to an agreement on the terms on which their ships would be provided for the operation to the Red Sea, the agreement being in the form of a space charter[5] or contract of carriage by water between the owners and the British Ministry of War Transport, an agency of the British Government, as charterer. The charter reduced to writing in the agreed form, was then submitted to the Commission for its approval, which was granted subject to certain modifications and conditions, and, in the form approved by the Commission, a

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[5] A "space charter", where the charterer generally pays on the basis of space provided for the shipment of his cargo and where the vessel remains under the operating control of the owner, is to be distinguished from a "bareboat charter", where a vessel is rented out for a specified period or voyage and the charterer gets possession and control of the vessel. Cf. *The Steel Inventor*, 35 F. Supp. 986, 994 (D. Md.); *Dampskibsselskabet* v. *Oil Co.*, 310 U. S. 268, 278.

charter for the Vermont was then executed between petitioner and the British Ministry of War Transport. Thereafter the Vermont completed its voyage to the Red Sea as required under the charter, and petitioner was paid by the Commission for freight and certain other items.

The charter itself speaks plainly enough on the identity of the parties between whom it purports to be a contract. It says, in unmistakable language, that it is an agreement "between CALIFORNIA EASTERN LINE, INC. Owners of the Steamship VERMONT * * * and BRITISH MINISTRY OF WAR TRANSPORT Charterers".[6] "In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded." See *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421-422; *Farm Security Administration* v. *Herren*, 165 F. 2d 554, 562 (C. A. 8), certiorari denied, 333 U. S. 875.

Nowhere in the charter is there a permissible basis for injecting the Commission as a party to the contract in contradiction of this clear declaration. As a ground for a contrary inference respondent points to the charter provision that "This charter not to become effective until approved by the United States Maritime Commission", and to the signature of the charter, after it had been executed by petitioner and an official of the British Ministry, by a Commission official to show the Commission's approval. It is far from clear, however, that this approval was either required or given because the Commission was acting as a party to the contract; more compelling reasons too readily suggest themselves. Thus, the Shipping Act of 1916, as amended, in Sections 9 and 37 (46 U. S. C. Secs. 808, 835)

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[6] Compare the totally different provision, where the Commission was a party to the charter, in *United States Lines Co.* v. *United States*, 52 F. Supp. 758, 760 n. 1 (S. D. N. Y.).

required approval of the Commission to charter of an American vessel to "any person not a citizen of the United States"; the Commission was aware of and considered this legal prerequisite in giving its approval. This may not only explain, in part at least, the charter requirement of approval, but tends to establish that the Commission did not consider itself as the charterer, or else its approval under that statute would have been unnecessary. If, moreover, the Commission had been a party to the charter, it was required by statute to insert an express condition that no member of or delegate to Congress would share in any profits or benefits thereunder (41 U. S. C. Sec. 22). Presumably the Commission was aware of this statutory requirement, and its failure to comply with it tends further to indicate that its approval was required for some reason other than that it was a party to the contract. Such a reason is suggested in the Commission's role as the agency for mobilizing the country's shipping resources and for carrying out and supervising the ocean transportation phase of the Lend-Lease program. The requirement of approval may well have been primarily a control device by which the Commission could assure itself that its functions were being properly executed, that the purposes for which the shipping was furnished were satisfied, and that all this was done in the most effective and economical way possible at the time. In any event, at the very minimum the meaning of the charter requirement of approval is so equivocal that we cannot assign it any force in overcoming the explicit statement in charter as to the identity of the contracting parties.

On a reading of the charter according to its terms, only one basic contention is advanced by respondent in support of the position that the contract was made with the Commission. That contention is that the contract does not express the true situation in this respect because the British Ministry of War Transport acted as the Commission's agent in entering into the charter, and the resulting con-

tract therefore was actually with the Commission and not the British Ministry. Assuming that respondent may go behind the contract in this fashion, we find, on the evidence, an indispensable element of this position to be lacking. The Commission cannot be treated as the charterer in place of the Ministry at least in the absence of an intent on the Commission's part, at the time the charter was entered into, to be a contracting party and to have the Ministry act as its agent. On the basis of all the evidence, we have concluded that the Commission did not have that intent.

First, within the same period that the Vermont charter was negotiated and executed, the Commission owned freighters which it desired to place in service to Red Sea ports. The Commission did not, however, itself undertake to operate those vessels in that service, but leased them on bareboat[7] charter to two steamship companies as operators, and the latter in turn entered into space charters respecting those ships with the British Ministry of War Transport, which acted for the British Government. The Commission clearly was not the charterer in these contracts between the operators and the Ministry of War Transport; otherwise the leasing of the ships to the operators by the Commission would seem to have been an incomprehensible act of futility. Yet the space charters executed between the operators and the British Ministry for the Commission-owned vessels were, except for names and some slight modifications, identical with the space charter for the Vermont executed between petitioner and the British Ministry. Those space charters of the Commission-owned vessels were, moreover, also drafted by Commission officials; were submitted in proposed form to the Commission for its approval; and provided that they were not to become effective until approved by the Commission. Comparison of the Vermont charter with the charters of the Commission-

[7] See note 5, *supra*, as to the nature of a bareboat charter.

owned vessels by the operators to the Ministry, and of the circumstances surrounding execution of these charters, seems to us to give rise to the valid inference that the Commission was no more a party to the Vermont charter than it was to the charter of its own vessels by the operators to the Ministry; that the Commission no more intended to be a party to the former charter than to the latter; and that the Ministry was no more an agent of the Commission in executing the former than the latter.

Secondly, when negotiations for the Vermont charter were carried on, when agreement was reached on the terms of the charter subject to the Commission's approval, and when that approval was given, the evidence shows that it was the Commission's understanding that it did not have the power to enter into a charter for the hire of ships.[8] On March 19, 1941, a bill had been introduced in Congress to confer such power on the Commission, and that bill had been referred to the Committee On Merchant Marine And Fisheries of the House of Representatives. See H. R. 4088, 77th Cong., 1st Sess., 87 Cong. Rec. 2387. While the bill was being considered by the Committee, and in response to a request of the Committee chairman, Admiral Land, then Chairman of the Commission, wrote to the committee to express the Commission's views. Admiral Land stated: "The bill would authorize the Maritime Commission, until July 1, 1942, to charter and purchase vessels, whether of United States or foreign documentation. . . * * * Under existing law, the Commission is not authorized to procure vessels by charter." This letter

[8] Respondent's contention, that there was a principal-agent relation between the Commission and the Ministry, raises questions not only as to the Commission's authority to hire vessels but also, if such authority existed, as to the Commission's power to exercise that authority through an agent which was a totally separate body and one belonging to a foreign government. These questions need not be treated, however, in view of the evidence that the Commission did not consider itself as having the authority in the first place.

was included verbatim in the committee's report recommending enactment of the measure (H. Rep. No. 440, 77th Cong., 1st Sess., at 9), and the proposal, conferring power so declared to be lacking, was thereafter adopted on June 6, 1941. Public Law 101, Section 3(a), 77th Cong., 1st Sess., 55 Stat. 242, 243, 50 U. S. C. App. Sec. 1273.[9]

It is difficult to believe that an agency which regards itself as "not authorized to procure vessels by charter", and which asks Congress for legislation conferring such authority on it, would at the same time intend to act in a manner which requires the exercise of that very power.[10] Even if the Vermont charter had been made after enactment of this statute bestowing power to charter vessels, it still would seem not to have been authorized by that statute, since it was a space charter whereas the statute only conferred authority on the Commission "to charter any vessel * * * on a time-charter or bare-boat basis * * *".

Thirdly, in all the evidence contemporaneous with the negotiation, execution, and performance of the charter,

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[9] Public Law 101 enacted H. R. 4466, 77th Cong., 1st Sess., which resulted from a combination of H. R. 4088, of which mention has been made, and H. J. Res. 167, also introduced in 77th Cong., 1st Sess. Section 3 (a) of Public Law 101, dealing with authority to charter, was taken from H. R. 4088.

[10] Respondent suggests that power in the Commission to charter the Vermont, under Section 902 of the Merchant Marine Act of 1936 (46 U. S. C. Sec. 1242), came into effect as a result of the Presidential proclamation of emergency of May 27, 1941 (55 Stat. 1647), which antedated the sailing of the Vermont from New York and of the signature of the charter. Even if it be assumed that this Act conferred such power in these circumstances, there is not the slightest indication in the evidence that the Commission's negotiations were carried on or concluded in anticipation of such power coming into operation. Moreover, as to the actual importance of the proclamation, it is to be noted that Congress nevertheless enacted Public Law 101, which became effective on June 6, 1941. See note 7, *supra*.

there is not, with one doubtful exception,[11] a single reference to the Commission as a party to the contract or as charterer, undisclosed or otherwise, of the Vermont. Coupled with this absence of explicit recognition concerning the Commission, there is in marked contrast frequent reference to the British Ministry of War Transport as charterer in correspondence and memoranda of Commission officials, in correspondence of the Chairman of the Commission, and in minutes of meetings of the Commission. Thus this evidence speaks of "charters which were entered into by various steamship owners with the British Ministry of War Transport"; the "charter to the British Ministry of War Transport"; "the charter of privately-owned American flag vessels to the British Ministry of War Transport". The very resolution of the Commission approving the form of charter stated that it was "for use by private owners of American-flag vessels in chartering their vessels to the British Ministry of War Transport,

[11] In one instance, during the negotiations on the terms of the proposed charter, a ship company official in arguing for a particular arbitration clause designed apparently to settle disputes through some medium other than the Commission, wrote in a communication dated May 13, 1941, that the "Maritime Commission will be a party directly or indirectly to the transaction". He seemed, in this, to be alluding to the Commission's part in arranging and negotiating the charter. If he meant any more, it became clear in later correspondence that he was speaking too broadly; the reply to that communication by a Commission official showed that the understanding between them was that an arm of the British Government was expected to be the charterer, the Commission official referring to the "charterer, who proposed to be British Ministry of Shipping". The same thought appears in the letter of another Commission official written shortly thereafter to the representatives of another ship company, the letter stating that "We have confirmed that the British Ministry of War Transport may be the charterer. However, we are unable to state today that this will be so inasmuch as there are certain details yet to be discussed by us with the British Ministry of War Transport". During the succeeding days it became completely settled that the British Ministry of War Transport was the charterer.

under arrangements heretofore made in cooperation with the Commission or which may hereafter be so made". The same recognition of the Ministry as the charterer, with elaboration of the Commission's role of "cooperation", is found in a letter by Admiral Land to Congressman Edward J. Hart, a member of the House Committee on Merchant Marine and Fisheries and chairman of its sub-committee investigating charter rates paid for voyages in the Red Sea operation: "In obtaining the use of ships on a voluntary basis [rather than requisitioning them], the Commission undertook to correlate and direct traffic. Charters were made between the shippers and the owners. The Maritime Commission organized the schedules, spotted the cargo and loading berths, and approved the charter rates. Its control was exercised by indirection. In the case of the Red Sea voyages, the ships were chartered by their owners to the British Ministry of War Transport. The charter hire was paid out of lend-lease funds allocated for the purpose, presumably on account of the problem of exchange involved."

To establish that the Commission was the charterer and that the British Ministry acted only as its agent, respondent offered two exhibits in evidence: (1) Exhibit G —a certificate executed by an Assistant Secretary of the British Ministry of Transport, together with an unsigned statement attached thereto, the certificate asserting that the statement was "based on information extracted from documents preserved in the archives of the Ministry of Transport (formerly Ministry of War Transport)"; and (2) Exhibit H—correspondence in which the Department of Justice sought "an official statement from the British Government concerning its view as to the relationship between the United States Government and the British Government at the time the charters were executed", together with other correspondence which accompanied transmittal of the material in Exhibit G furnished in response to this request. Petitioner objected to the com-

petence of these exhibits.[12] We have concluded that petitioner's objection should be sustained as to Exhibit G, and, since Exhibit H merely qualifies Exhibit G and falls with it, we have accordingly ruled that both of these exhibits are inadmissible. Exhibit G is not an "official statement from the British Government" as to any of the facts which respondent wishes us to take into account. The evidence upon which respondent relies is the statement appended to the certificate. Nowhere in the certificate of the Assistant Secretary of the Ministry of Transport is there any representation that the attached document represents the official views of the British Government; he certifies merely that the statement is "based on information extracted from documents preserved in the archives of the Ministry of Transport", and that to the best of his knowledge and belief it is a true statement. The statement itself does not appear to be an official record, nor is it an official statement of the views of the British Government. It merely incorporates information said to be collected by some unidentified person, and said to have been "extracted" from unidentified and undescribed documents. There are here none of the safeguards in the presence of which the hazards of hearsay evidence and of the absence of cross-examination are risked. Contrary to respondent's contention, Exhibit G does not satisfy the conditions under which official statements are admitted in exception to the hearsay rule. Cf. *Gilbert* v. *Gulf Oil Corp.*, 175 F. 2d 705, 710 (C.A. 4); *United States* v. *Grayson*, 166 F. 2d 863, 868-869 (C.A. 2); *Franklin* v. *Skelly Oil Co.*, 141 F. 2d 568, 572 (C.A. 10); *Von Zedtwitz* v. *Sutherland*, 26 F. 2d 525, 526 (C.A. D.C.);

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[12] The relevance of these exhibits might also be questioned if it were concluded that the Commission had no power to act through an agent like the British Ministry, and that any attempt to act in this way could not produce a contract with the Commission. These are matters which need not be considered (see note 8, *supra*), and we therefore assume these documents to be relevant.

Guettler v. *Alfsen*, 289 Fed. 613, 614 (C.A. D.C.). We point out, furthermore, that even if Exhibits G and H were admitted, they would not, taken together with all the other evidence, cause us to change any of our conclusions as to the facts as we have found them. Even in the presence of these exhibits, which reflect at best only the "view" or "understanding" of certain unidentified persons, the evidence in its entirety establishes to our satisfaction that in fact the British Ministry neither acted nor was intended by the Commission to act as the Commission's agent in entering into the Vermont charter, and that the charter was not with the Commission.

Respondent's contention, that the British Ministry acted as the Commission's agent and that the Commission was the charterer of the Vermont, is based on the facts that the Commission negotiated the terms and form of the charter, exercised supervision over performance under the charter, and, in behalf of the United States Government, furnished the funds and controlled payment under the charter. We think it does not necessarily follow, under the Renegotiation Act, that these circumstances stamped the charter as being a contract with the Commission.[13] The question of

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[13] Little help is provided on the instant issue by the statutory history of the Renegotiation Act. It is interesting to note in this connection, however, the opinion on another situation of some members of Congress. After the Lend-Lease program was put into effect, certain contracts between American manufacturers and foreign governments, placing large orders for war equipment, were taken over by the United States at the prices fixed in those contracts. Most of the articles covered by the contracts had not yet been produced at the time they were taken over. Production of these items was then supervised by the United States; the goods were paid for by the United States with Lend-Lease funds; and the United States distributed the equipment to the armed forces of foreign governments. One of the agencies acting for the United States in this matter was the War Department, which was one of the "departments" named in the Renegotiation Act. These contracts were not considered to be within that Act. H. Rep. No. 733, 78th Cong., 1st Sess., 25-26 (report on renegotiation of war con-

fact remained whether on the entire evidence the charter was such a contract. As the repository of these very important powers, the Commission might have chosen in some circumstances to charter the Vermont itself, making all other arrangements substantially the same as it did here, and to undertake transportation of the British cargo to the destinations at which it was required. Whatever the reasons may have been, whether because of lack of authority or because of restrictions on its action which exigencies of the international situation then imposed on the United States as a non-belligerent, the fact is that the Commission avoided selection of this course. It chose rather that in which the British Ministry was the charterer and in which the contract was with the British Ministry; to itself the Commission relegated the function of making the arrangement and tending to other matters

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tracts by House Committee On Naval Affairs, made pursuant to House resolution directing investigation of war effort); 90 Cong. Rec. 1357 (1944) (statement by Congressman Ed. V. Izac, member of House Committee On Naval Affairs, in debate on the amendments to the Renegotiation Act made by the Revenue Act of 1943).

Similarly, although administrative pronouncements do not dispose of the issue before us, they seem to place emphasis on the parties who *entered into* the contract, while apparently not regarding possession of certain powers as conclusive. The Joint Renegotiation Manual, issued under the 1942 Act by the "departments" concerned and given approval by the Maritime Commission, stated (at par. 323.3): "All so-called lend-lease contracts entered into by any of the departments having renegotiation authority are subject to the provisions of the Act. However, lend-lease contracts entered into by any other department or agency of the Government are not subject to renegotiation under existing law." The Renegotiation Regulations For Fiscal Years Ending After June 30, 1943 (issued under the Renegotiation Act) provide (at par. 332.10) in dealing with "Contracts Involving Named Departments and Departments or Agencies other than Named Departments": "As a general rule, the renegotiability of such contracts depends upon whether the contract is with a named Department and not upon whether a named Department receives delivery of, or pays for, the articles purchased."

in a way which would make it possible for the British Ministry to charter the Vermont. The contract in fact was, and was intended to be, with the British Ministry and not with the Commission. Cf. *Waterman S. S. Corporation* v. *Land*, 151 F. 2d 292, 293-296 (C.A. D.C.), reversed on other grounds, sub. nom. *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Alabama* v. *King & Boozer*, 314 U.S. 1, 13; *United States* v. *Algoma Lumber Co., supra; Farm Security Administration* v. *Herren, supra.*

In finding for petitioner, it is unnecessary to pass on its contention that the burden of proof in this matter was on respondent. Assuming the burden to be on petitioner, we think that burden was met.

We have reached the result herein with reluctance, since the basic policy underlying the Renegotiation Act would seem to call for the renegotiation of this contract, but we have been unable to conclude that this contract is covered by the statute.

Reviewed by the Court.

Decision will be entered for the petitioner.

TURNER, *J.*, dissenting:

I have studied and considered what is said in the opinion of the Court in explanation of its conclusion that the United States was not a party to the charter contract herein. But when all is said and the theorizing is ended, the facts as I read them still show, regardless of the formalities indulged in, that it was the United States, rather than Great Britain, which contracted with the ship owners. The British Government asked the United States to furnish to it a substantial amount of much needed merchant cargo space and the United States, through its Maritime Commission, contracted for and delivered the merchant shipping requested. It is, of course, true that the paper record took the form of space charter contracts directly between

various shipowners and the British Government, but I do not believe that even the petitioner, and others likewise resisting renegotiation of similar contracts, could with straight face and countenance seriously contend that the consideration flowing to them under the contracts in question was not the obligation of the United States, rather than that of Great Britain. Certainly, as I understand the evidence, that was the position taken by the British Government when it was asked to sign the charter contracts. It accepted the form taken by the contracts only when it was assured that it would not be so obligated, and it was only after receiving assurances to that effect that its Ministry of War Transport signed the papers in question.

It is true that the charter fees were to be paid from moneys appropriated by the Congress of the United States, under its so-called Lend-Lease legislation, and under that legislation accounts were kept which on their face pictured the expenditures as loans and indicating an obligation on the part of Great Britain to make repayment thereof at some indefinite time in the future. That such, however, was not the commonly accepted meaning and intent of the legislation, is too well known to require discussion. The common understanding based on the public utterances of the President, other Government officials and Members of Congress was that such portions of Lend-Lease funds as might be regarded as having been directly expended and consumed in the prosecution of the war were to be regarded as having been spent by this Government as its contribution thereto and that countries receiving the benefit in their fighting of the war of such expenditures would never be called on to account for or repay such moneys. That such was the purpose and intent of the Lend-Lease legislation is corroborated, as shown by evidence in the record in this case, by what was done when the representatives of the United States and the British Government sat down together after the end of hostilities to

balance their accounts. The attitude taken by the British Government at the time it was requested to sign the charter contract herein was accepted and it was agreed that the money so paid out by the United States were moneys paid by it in pursuance of its participation in the war.

The Court has not, in my opinion, squarely faced and dealt with the purposes and results of the Lend-Lease legislation as it bears upon and affects transactions of the kind involved herein. But rather, it allows itself to be drawn into a consideration and discussion of a question of agency, which, in my opinion, might never be reached if a more realistic approach is made to the question before us.

[Caption]

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated February 15, 1952, it is

ORDERED and DECIDED: That there is no renegotiable contract within Section 403(c)(1) of the Renegotiation Act.

Enter: ENTERED FEB 26 1952.

/s/ ARNOLD RAUM,
Judge.

[SEAL.]

APPENDIX C

271 F. 2d 754

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 11448

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, as Successors to the Chairman of the United States Maritime Commission, *Petitioners*,

v.

CALIFORNIA EASTERN LINE, INC., *Respondent*.

Argued on remand from Supreme Court, May 18, 1955. Decided February 16, 1956.

Mr. Frederick N. Curley, Atty., Dept. of Justice, with whom Mr. Edward H. Hickey, Atty., Dept. of Justice, was on the brief, for petitioners.

Mr. Samuel D. Slade, Atty., Dept. of Justice, also entered an appearance for petitioners.

Mr. Robert E. Kline, Jr., Washington, D. C., for respondent.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

DANAHER, Circuit Judge.

[1] The controversy here presented arose under the Renegotiation Act, as amended.[1] The Tax Court by its decision and order of February 26, 1952, ruled that there was presented no re-negotiable contract within § 403(c)(1). See 1952, 17 T.C. 1325. When the Government filed its petition for review, we were first confronted with a jurisdictional question because of lack of the proper parties. See 1953, 92 U.S. App. D.C. 207, 204 F.2d 398. When

[1] Act of April 28, 1942, 56 Stat. 245, as amended, 50 U.S.C.A. App. § 1191.

next before us, we dismissed the petition for review for lack of jurisdiction, for reasons stated in 1954, 93 U.S. App. D.C. 289, 211 F.2d 635. Rehearing en banc by this court having been denied, certiorari was granted, 1954, 348 U.S. 810, 75 S.Ct. 59, 99 L.Ed. 639, and the Court thereafter held that "the Tax Court's decision in this case is * * * subject to the normal type of review authorized by § 1141." United States v. California Eastern Line, 1955, 348 U.S. 351, 355, 75 S.Ct. 419, 422, 99 L.Ed. 383. It thereupon became our duty to review the Tax Court's determination, and in doing so we have proceeded "in the same manner and to the same extent as [with] decisions of the district courts in civil actions tried without a jury".[2]

[2] Since, from the various opinions cited the facts appear in sufficient detail, we present only such background as is required to highlight the basic problem. In 1941 the Maritime Commission assembled some 2,000,000 tons of merchant shipping, including an intercoastal ship VERMONT owned by California Eastern Line, Inc. The Commission negotiated the terms of a charter between the owner and the British Ministry of War pursuant to which the VERMONT sailed for a Red Sea port with supplies for use in the African campaign. After the VERMONT's departure, May 29, 1941, the charter was formally signed by the owner and by a representative of the British Ministry of War and expressly ran between the signatories. The Government claims that the British acted on behalf of and as agent for the Maritime Commission, but the Tax Court specifically found to the contrary and upheld the owner's contention in this respect. The Commission, from Lend-lease funds appropriated by the Congress for the purpose, paid the owner about $351,000 as charter hire, of which the amount of $164,000 was later determined by the Maritime Commission to be "excessive

[2] 26 U.S.C. § 1141(a) (1952); Lichter v. United States, 1955, 95 U.S. App. D.C. 316, 221 F. 2d 869, certiorari denied, 350 U.S. 822, 76 S. Ct. 49.

profits," said to be subject to renegotiation. The shipowner thereupon petitioned the Tax Court for relief, asserting that the charter was not subject to renegotiation, because (a) it was not made with the Maritime Commission, but with Great Britain[3]; (b) "final" payment under the charter was made June 23, 1941, hence the Act of April 28, 1942, could not apply[4]; and (c) the renegotiation was commenced more than one year after the close of the contractor's fiscal year within which the contract had been completed.[5]

Judge Raum's able opinion concluded:

> "Respondent's contention, that the British Ministry acted as the Commission's agent and that the Commission was the charterer of the Vermont, is based on the facts that the Commission negotiated the terms and form of the charter, exercised supervision over performance under the charter, and, in behalf of the United States Government, furnished the funds and controlled payment under the charter. We think it does not necessarily follow, under the Renegotiation Act, that these circumstances stamped the charter as being a contract with the Commission. The question of fact remained whether on the entire evidence the charter was such a contract. As the repository of these very important powers, the Commission might have chosen in some circumstances to charter the Vermont itself, making all other arrangements substantially the same as it did here, and to undertake transportation of the British cargo to the destinations at which it was required. Whatever the reasons may have been, whether because of lack of authority or because of restrictions on its action which exigencies

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[3] § 403(c) (1) of the Renegotiation Act of 1942, note 1 supra.

[4] Id. § 403(c) (6).

[5] Id. § 403(c) (3).

of the international situation then imposed on the United States as a non-belligerent, the fact is that the Commission avoided selection of this course. It chose rather that in which the British Ministry was the charterer and in which the contract was with the British Ministry; to itself the Commission relegated the function of making the arrangement and tending to other matters in a way which would make it possible for the British Ministry to charter the Vermont. The contract in fact was, and was intended to be, with the British Ministry and not with the Commission. Cf. Waterman S. S. Corporation v. Land, [80 U.S. App.D.C. 167] 151 F.2d 292, 293-296, reversed on other grounds, sub. nom. Macauley v. Waterman S. S. Corp., 327 U.S. 540 [66 S.Ct. 712, 90 L.Ed. 839] * * *." 1952, 17 T.C. 1325, 1341-1342.

The Government in its brief says:

> "In this Court, the questions presented are: (1) Whether the Tax Court erred in excluding certain evidence offered by petitioners in support of their defense, and (2) whether the holding by the Tax Court that the contract in question was not a contract with the Commission within the meaning of Section 403(c) (1) of the Renegotiation Act was warranted by and consistent with the subsidiary findings of fact made by that court. No question is raised as to the validity of any of the subsidiary findings of fact, most of which were based on stipulated facts."

Because of the earnest insistence by the Government that the Tax Court's findings must fall, we have carefully examined the entire record and the scores of exhibits included. Not only do we conclude that there has been demonstrated no error affecting substantial rights, but on the same record, we would in all probability have arrived at the same result as did the Tax Court. The Government

seems really to have been persuaded by its firm conviction that the profits were in fact excessive and should have been recaptured, at least to the extent of $164,000. Such a view is understandable, yet, from the very outset the Commission must have known exactly what its cost problem was. Its May 23, 1941, minutes disclose its plan

> "* * * for the execution of a space charter between the vessel owners and the British Ministry of War Transport. A copy of the proposed form of charter is attached. It provides that the owner of the vessel will receive 75¢ per cubic foot on the total bale cargo capacity of his vessel and, if any cargo is carried on deck, 60¢ per cubic foot on actual measurement of such cargo. * * * For example, on a vessel with 400,000 cubic feet of bale cargo space and no cargo carried on deck, the vessel owner will be paid $300,000 for the voyage to Suez * * *."

The space charter of the very craft here involved called for a payment of the full sum of $336,577, which was made June 23, 1941, as the Tax Court found.

No one then was asking Congress to authorize the rewriting of charter-hire or, in the alternative, the requisitioning of the vessels whose owners might refuse to risk their loss in Red Sea wartime voyages or to accept disruption of their own service to their own loss. Replacements for ships lost were hard to find and costs were high. The movement of vast quantities of explosives was involved. The extent of the hazard was unknown. Shipping was at a premium, indeed commercial rates at the time amounted to $1. or more per cubic foot. Every vessel could profitably be employed in neutral waters without the possibility of need for repairs at some distant port unequipped to deal with emergency conditions. What, if any, return cargoes could be picked up was uncertain. Above all, the urgent need in 1941 for expedited delivery of war supplies commanded arrangements which in

different and later stages of the war were otherwise to be scrutinized and better controlled. But in May 1941, the plain and well realized fact was that the Commission had no effective legal control over space charter rates. Congress conferred no power over charter rates generally until long after the vessel had sailed and delivered her cargo.

Even when the Renegotiation Act was first considered as § 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Congress did not seek retroactively to reach excessive profits paid for supplies sold or transportation service rendered to the nations with which we later were allied. Nor did the Commission, possessed of the facts, seek such authority, indeed its minutes for November 19, 1942, disclose the Chairman had called a conference with the owners of various "Red Sea" vessels to seek a voluntary rebate plan.

> "From our investigation," he said "we now are convinced that the rates were too high, and exceedingly so, and it is my feeling that the various steamship owners should voluntarily make a refund, thereby remedying the situation. If that is not done, no doubt the Comptroller General will report the results to the Congress, and you may be assured that we will be confronted with an investigation by some committee, with results which, in my opinion, will be injurious to the American merchant marine."

In this case, not until November 27, 1943, was an effort made to set in motion the renegotiation procedures. Not until 1949 was a "determination" made.

By letter of March 22, 1943, the Chairman reported to Congressman Hart, Chairman, Special Subcommittee on Charter Rates, House Committee on the Merchant Marine and Fisheries:

> "The Commission did not pay the charter hire, in this instance or others, at the time under discussion. It approved the rates to be paid. In obtaining the use of ships on a voluntary basis, the Commission undertook to correlate and direct traffic. Charters were made between the shippers and the owners. * * * In the case of the Red Sea voyages, the ships were chartered by their owners to the British Ministry of War Transport. The charter hire was paid out of lend-lease funds allocated for the purpose, presumably on account of the problem of exchange involved."

As of March 29, 1943, referring to correspondence "relating to certain space charters between the British Ministry of War Transport and American owners of vessels for carriage of lend-lease material to the Red Sea," the Chairman informed the Comptroller General's Office that Commission counsel had "advised that the application of the renegotiation statute was doubtful (1) as to all of the charters because the United States was not a party thereto, and (2) as to those charters on which final payments had been made prior to the enactment of the renegotiation act."

And so the record goes, overwhelming the suggestion that the British Ministry of War Transport was the agent in any capacity for the Government of the United States or for any of the Departments enumerated in the statute.

[3] But, the Government now says, despite what the terms of the charter were, and irrespective of the Commission's own understanding of the transaction, the Tax Court's findings and conclusions must be reversed because of the British Government's view as to its understanding of the relationship which prevailed in 1941.

This understanding, it is argued, is to be discerned from a "statement" which was excluded by the Tax Court. Calling attention to the pendency of this case which "will

be the lead case in a series," the Department of Justice asked the Department of State to procure from the British Government an official "statement" as to the relationship "between the United States Government and the British Government" at the time the charters were executed. In due course, back through channels came a certificate which reads:

> "I, Frederick Victor Cross, an Assistant Secretary of the Ministry of Transport, HEREBY CERTIFY that the document hereto attached and marked 'A' is a STATEMENT based on Information extracted from documents preserved in the archives of the Ministry of Transport (formerly the Ministry of War Transport); and that to the best of my knowledge and belief, it is a TRUE STATEMENT.
>
> "F. V. CROSS.
>
> "18th January, 1951.
> "Ministry of Transport,
> "Berkeley Square House,
> "London, W. 1."

The attached statement appears in the margin.[6]

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[6] "Statement by His Majesty's Government as to the circumstances under which certain American vessels were made available for the carriage of war supplies to the Red Sea Area in 1941.

"1. His Majesty's Government, early in 1941, requested the United States Government, and the United States Government agreed, to furnish certain shipping tonnage necessary to the prosecution of the War in which His Majesty's Government was then engaged. The United States Government agreed to furnish such tonnage at its own expense and no arrangement for reimbursement by His Majesty's Government has been, or will be, made.

"2. Such tonnage was, during 1941 and 1942, furnished by means of certain charters with various shipowners covering voyages to Red Sea ports, commonly referred to as 'Red Sea Charters', a list of which is attached hereto.

"3. His Majesty's Government took no part in the negotiations with the shipowners leading up to the execution of said charters.

While it is true that the document was excluded, it is equally clear that the Tax Court carefully considered the claims of the respective parties with reference to it. We previously had occasion to note that the Tax Court after examination of the statement concluded: "that even upon that basis the Government did not establish its point."[7]

Government counsel, steadfast as ever throughout this prolonged litigation, zealously argued to us that the Tax Court was legally bound to admit as evidence the "official statement" of the British Government and thereupon to accept, as proved from that statement, such purported facts as would establish that the British Ministry of War Transport acted as the agent of the Maritime Commission. It would then follow—counsel say—that the

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"4. At the request of the United States Government, the British Ministry of War Transport, a representative of His Majesty's Government, signed the charters as negotiated and drafted by the United States Maritime Commission and the shipowners. The signature by the representative of His Majesty's Government was requested by the United States Government on the ground that it was necessary to meet *formal* requirements. No charters were in fact executed by the representative of His Majesty's Government until after the receipt of a letter dated June 9, 1941, from the Office for Emergency Management to the effect that the obligations of the charters would be met by the United States Maritime Commission on behalf of the United States Government.

"5. When the representative of His Majesty's Government signed the above-mentioned charters, it was understood that His Majesty's Government in signing said charters were agents only and that the principal and real party in interest was the United States Government as represented by the United States Maritime Commission.

"6. The bills submitted by the ship owners under said charters to His Majesty's Government were forwarded to the United States Maritime Commission for payment. In forwarding such bills, the representatives of His Majesty's Government certified merely that the services specified had been performed."

[7] United States v. California Eastern Line, 1954, 93 U.S. App. D.C. 289, 211 F. 2d 635, note 13.

charter did not run between the named parties, but was in fact a contract between the shipowner and the Maritime Commission.[8]

Thus the Tax Court's decision would be caused to depend upon the conclusions drawn in 1951 from unidentified documents in British archives, by some Assistant Secretary of the Ministry of Transport, with no showing as to his competence so to act, if he personally did act, and with no identification as to who compiled the "statement" if it were not Mr. Cross. An "Acting Assistant Attorney General," while this case was pending, asked that the British authorities supply the "statement" for use as evidence here. It was described as "vitally important" to the Government's position. Yet our Government must have had access to all Maritime Commission files as well as to other official American departmental files. It surely could have called as witnesses Admiral Land, former Commission chairman, and various other officials who, in the day and time of the transaction, had firsthand knowledge of all pertinent facts. Despite the availability of American sources, to accord to the proffered evidence any such force as is now sought for it would do violence to the understanding of many as to the basis for a "public document" exception to the hearsay rule. The Government cites as authority such cases, among others, as Ex parte State of New York, 1921, 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063; Agency of Canadian Car & Foundry Co. v. American Can Co., D.C. S.D.N.Y. 1918, 253 F. 152 and Culbertson v. H. Witbeck Co., 1888, 127 U.S. 326, 8 S.Ct. 1136, 32 L.Ed. 134.

The Tax Court considered the document and commented thus:

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[8] Compare the analysis by Chief Judge Groner in Waterman S. S. Corporation v. Land, 1945, 80 U.S. App. D.C. 167, 151 F. 2d 292, reversed on a jurisdictional point, Macauley v. Waterman S. S. Corp., 1946, 327 U.S. 540, 66 S. Ct 712, 90 L. Ed. 839.

"Nowhere in the certificate of the Assistant Secretary of the Ministry of Transport is there any representation that the attached document represents the official views of the British Government; he certifies merely that the statement is 'based on information extracted from documents preserved in the archives of the Ministry of Transport', and that to the best of his knowledge and belief it is a true statement. The statement itself does not appear to be an official record, nor is it an official statement of the views of the British Government. It merely incorporates information said to be collected by some unidentified person, and said to have been 'extracted' from unidentified and undescribed documents. There are here none of the safeguards in the presence of which the hazards of hearsay evidence and of the absence of cross-examination are risked. Contrary to respondent's contention, Exhibit G does not satisfy the conditions under which official statements are admitted in exception to the hearsay rule. Cf. Gilbert v. Gulf Oil Corp. [4 Cir.], 175 F.2d 705, 710; United States v. Grayson [2 Cir.], 166 F.2d 863, 868-869; Franklin v. Skelly Oil Co. [10 Cir.], 141 F.2d 568, 572, 153 A.L.R. 156; Von Zedtwitz v. Sutherland [58 App.D.C. 153], 26 F.2d 525, 526; Guettler v. Alfsen [53 App.D.C. 215], 289 F. 613, 614. We point out, furthermore, that even if Exhibits G and H were admitted, they would not, taken together with all the other evidence, cause us to change any of our conclusions as to the facts as we have found them. Even in the presence of these exhibits, which reflect at best only the 'view' or 'understanding' of certain unidentified persons, the evidence in its entirety establishes to our satisfaction that in fact the British Ministry neither acted nor was intended by the Commission to act as the Commission's agent in entering into the Vermont charter, and that the charter was

not with the Commission." 1952, 17 T.C. 1325, 1340-1341.

We need not rule directly upon the admissibility of the document or decide that it shall have "the force of proof"[9] or that it is any more than a statement of the contentions of the Government as a litigant. It certainly is not offered by the British Government in its own behalf. We regard it as immaterial in the light of the whole record, the facts as stipulated, and the exhibits. Whether the British Government held the view or "understood" that we should earlier have entered the war, or that the United States was transporting for its own account war goods purchased by Great Britain for use by the latter in the African campaign, or that its Ministry of War Transport was acting as our Government's agent for the accomplishment of our nation's objectives is beside the point. That we had a purpose is well known. Our own Government took careful, planned and cautious steps to carry on this transaction for the benefit "of the democracies", as President Roosevelt said in his April 30, 1941, letter to the Commission. The whole operation was "'"part of the defense effort to which this country is committed"'".[10] For reasons deemed valid by the Executive, means were then adopted to make certain that at the bar of history, the United States would not appear as a belligerent, or as committing an act of war or as offering, under American auspices, a target to the aggressor. The measures were designed to protect our status, and the Commission saw to it that the documents reflected that status. That they were sufficient, as the Tax Court concluded, we agree.

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[9] Compania Espanola De Navegacion Maritima, S. A. v. The Navemar, 1938, 303 U.S. 68, 75, 58 S. Ct. 432, 82 L. Ed. 667; cf. Von Zedtwitz v. Sutherland, 1928, 58 App. D.C. 153, 154, 26 F. 2d 525.

[10] Macauley v. Waterman S. S. Corp., 1946, 327 U.S. 540, 542 note 2, 66 S. Ct. 712, 713, 90 L. Ed. 839.

Thus, it has not been shown that the Tax Court's findings are clearly erroneous, or that its conclusions lack substantial support in the record. Such a result is in harmony with the Congressional purpose as stated in the Renegotiation Act, quite apart from the changed circumstances after our entrance into the war and the more expanded controls which followed.

The contract was not subject to renegotiation as one made with the Maritime Commission, or as a subcontract thereunder. Moreover, the Tax Court found that there was a "full payment" on June 23, 1941; whether it was "final" so as to be beyond renegotiation since made prior to April 28, 1942, was not decided, but had it been, a substantial basis for a conclusion of finality can be discerned. We make no comment on the date of commencement of proceedings in relation to the petitioner's fiscal year. We have said enough to indicate why, in our judgment, this litigation has had its day.

Affirmed.

APPENDIX D

RENEGOTIATION ACT OF 1942, as amended (P.L. 528, 77th Cong., 2d Sess., as amended by P.L. 753, 77th Cong., 2d Sess.).

SEC. 403(c)(6). This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942 . . .

* * * *

No renegotiation of the contract price pursuant to any provision thereof, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

SHIPPING ACT, 1916, as amended (46 U.S.C. 808, 835).

SEC. 9.

* * * *

Except as provided in section 611 of the Merchant Marine Act, 1936, as amended, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

SEC. 37. That when the United States is at war or during any national emergency, the existence of which is declared by proclamation of the President, it shall be unlawful, without first obtaining the approval of the Board.

(a) To transfer to or place under any foreign registry or flag any vessel owned in whole or in part by any person a citizen of the United States or by a corporation organized under the laws of the United States, or of any State, Territory, District, or possession thereof; or

(b) To sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver or in any manner transfer to any person not a citizen of the United States, (1) any such vessel or any interest therein, or (2) any vessel documented under the laws of the United States, or any interest therein, . . .

* * * *